Supreme Court, U.S.
FILED
07-635 NOV 13 2007
OFFICE OF THE CLERK

No. 1

In the
Supreme Court of the United States

BRUCE PETERS,

Petitioner,

v.

VILLAGE OF CLIFTON, an Illinois municipal corporation; ALEXANDER, COX & McTAGGERT, INC.; and JOSEPH McTAGGERT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

*J. DAVID BREEMER
Counsel of Record
R.S. RADFORD
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Petitioner

QUESTIONS PRESENTED

1. Should the Court overrule *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* to the extent it requires property owners to seek compensation in state courts to ripen a federal takings claim, where four Justices of this Court recognized in *San Remo Hotel v. City and County of San Francisco* that such a rule lacks any legitimate doctrinal basis and causes tremendous and unintended jurisdictional confusion?

2. Is a claim against a traditional physical taking—occurring without any contemporaneous provision of compensation—subject to *Williamson County*'s state procedures ripeness rule, where that rule was articulated in the regulatory takings context, and effectively strips the federal courts of any role in the development of physical takings law?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AT ISSUE ... 1

STATEMENT OF THE CASE 2

A. Facts 5

B. Procedure 7

1. District Court 7

2. The Seventh Circuit's Decision 8

REASONS FOR GRANTING THE WRIT 10

I. THE STATE PROCEDURES REQUIREMENT LACKS ANY DOCTRINAL JUSTIFICATION AND CAUSES UNANTICIPATED AND UNACCEPTABLE JURISDICTIONAL CONFUSION 10

A. The Requirement That a Federal Takings Plaintiff Must Complete and Lose State Court Litigation to "Ripen" a Federal Takings Claim Has No Plausible Support 11

TABLE OF CONTENTS—Continued

Page

B. The State Compensation Requirement Creates a Contradictory and Unpredictable Jurisdictional Framework 16

1. The State Compensation Procedures Predicate Conflicts with Res Judicata Principles That Bar Federal Relitigation of Failed State Court Claims 17

2. The State Procedures Requirement Conflicts with Removal Jurisdiction, and Defendants May Be Financially Punished When They Attempt Removal of a Federal Takings Claim Prior to State Procedures 21

II. THE DECISION BELOW RAISES AN IMPORTANT ISSUE AS TO WHETHER THE STATE COMPENSATION PROCEDURES REQUIREMENT—DESIGNED TO APPLY IN THE REGULATORY TAKINGS CONTEXT—ALSO APPLIES TO BAR TRADITIONAL PHYSICAL TAKINGS CLAIMS FROM FEDERAL COURTS 25

A. Applying the Regulatory Takings State Procedures Requirement to Physical Takings Claims Ends the Federal Courts' Historic and Legitimate Role in Fifth Amendment Physical Takings Law 26

TABLE OF CONTENTS—Continued

Page

1. Physical Taking Claims Have Historically Raised Constitutional Questions Worthy of Federal Scrutiny 26

2. Applying the Regulatory Takings State Procedures Requirement to Physical Takings Ends Federal Involvement in That Important Area of Constitutional Law 28

B. Applying the State Compensation Rule to Physical Takings Conflicts with This Court's Clear Demarcation Between Regulatory and Physical Takings 29

CONCLUSION 31

APPENDIX A - Opinion of the Seventh Circuit Court of Appeals (Aug. 22, 2007)

APPENDIX B - Opinion of the United States District Court, Central District of Illinois (Apr. 18, 2006)

APPENDIX C - Magistrate's Report and Recommendation, United States District Court, Central District of Illinois (Mar. 28, 2006)

TABLE OF AUTHORITIES

Page

Cases

Allen v. McCurry, 449 U.S. 90 (1980) 17

Asociacion De Subscripcion Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza, 484 F.3d 1 (1st Cir. 2007) 3

Bigelow v. Michigan Dep't of Natural Res., 970 F.2d 154 (6th Cir. 1992) 21

Brown v. Legal Foundation of Washington, 538 U.S. 216 (2003) 29

Caldwell v. Commissioners of Highways of Towns of Scott, Mahomet, and Sangamon, 94 N.E. 490 (Ill. 1911) 15

Carrollton Properties, Ltd. v. City of Carrollton, Texas, 2006 WL 2559535 (E.D. Tex. 2006) 22-23

Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226 (1897) 26

City of Chicago v. Int'l College of Surgeons, 522 U.S. 156 (1997) 22

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) 24

DLX, Inc. v. Kentucky, 381 F.3d 511 (6th Cir. 2004) 3, 18-20

Dodd v. Hood River County, 59 F.3d 852 (9th Cir. 1995) 20

TABLE OF AUTHORITIES—Continued

Page

Doney v. Pacific County,
2007 WL 1381515 (W.D. Wash. 2007) 22

Exxon Mobil Corp. v. Saudi Basic Industries Corp.,
544 U.S. 280 (2005) 20

Fields v. Sarasota Manatee Airport Auth.,
953 F.2d 1299 (11th Cir. 1992) 3, 19

First English Evangelical Lutheran Church of Glendale v. Los Angeles,
482 U.S. 304 (1987) 13

Forseth v. Village of Sussex,
199 F.3d 363 (7th Cir. 2000) 9

Hall v. City of Santa Barbara,
833 F.2d 1270 (9th Cir. 1987) 30

Hoagland v. Town of Clear Lake,
415 F.3d 693 (7th Cir. 2005),
cert. denied, 547 U.S. 1004 (2006) 4

Home Tel. & Tel. Co. v. City of Los Angeles,
227 U.S. 278 (1913) 27

Johnson v. City of Shorewood,
360 F.3d 810 (8th Cir. 2000) 20

Kaiser Aetna v. United States,
444 U.S. 164 (1979) 26-27

Kirby Forest Industries, Inc. v. United States,
467 U.S. 1 (1984) 14

Kruse v. Village of Chagrin Falls, Ohio,
74 F.3d 694 (6th Cir. 1996) 30

Lawrence v. Texas, 539 U.S. 558 (2003) 16

TABLE OF AUTHORITIES—Continued

Page

Lingle v. Chevron U.S.A.,
544 U.S. 528 (2005) 11

Loretto v. Teleprompter Manhattan CATV Corp.,
458 U.S. 419 (1982) 26

McNamara v. City of Rittman,
473 F.3d 633 (6th Cir. 2007), *cert. denied*,
— S. Ct. —, 2007 WL 1385120 (2007) 4

Monell v. New York City Dept. of Social Services,
436 U.S. 658 (1978). 15

Moore v. Covington County Comm'n,
2007 WL 1771384 (M.D. Ala. 2007) 22

Palomar Mobilehome Park Ass'n. v. City of San Marcos, 989 F.2d 362 (9th Cir. 1993) 19

Parratt v. Taylor, 451 U.S. 527 (1981) 12

Pascoag Reservoir & Dam, LLC v. Rhode Island,
337 F.3d 87 (1st Cir. 2003) 30

Quivira Village, LLC v. City of Lake Quivera, Kansas, 2004 WL 1701070 (D. Kan. 2004) 23

Raymond v. Chicago Union Traction Co.,
207 U.S. 20 (1907) 27

Reahard v. Lee County,
30 F.3d 1412 (11th Cir. 1994) 23

Rockstead v. City of Crystal Lake,
486 F.3d 963 (7th Cir. 2007),
cert denied,— S. Ct. —,
2007 WL 2565005 (2007) 4, 18-19, 28

TABLE OF AUTHORITIES—Continued

Page

Ruckelshaus v. Monsanto,
467 U.S. 986 (1984) 12

San Remo Hotel v. City and County of San Francisco, 545 U.S. 323 (2005) . . . . . *passim*

Sandy Creek Investors, Ltd. v. City of Jonestown, Tex., 325 F.3d 623 (5th Cir. 2003) 23

Seminole Tribe of Florida v. Florida,
517 U.S. 44 (1996) 24

SFW Arecibo, Ltd. v. Rodriguez,
415 F.3d 135 (1st Cir. 2005), *cert. denied*,
546 U.S. 1075 (2005) 4

Suitum v. Tahoe Reg'l Planning Agency,
520 U.S. 725 (1997) 9, 25

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,
535 U.S. 302 (2002) 26, 29-30

Torromeo v. Town Of Fremont, NH,
438 F.3d 113 (1st Cir. 2006);
cert. denied, 127 S. Ct. 257 (2006) 4

United States v. Clarke,
445 U.S. 253 (1980) 14, 30

United States v. Dickinson,
331 U.S. 745 (1947) 14

United States v. Dow, 357 U.S. 17 (1958) 14

United States v. General Motors Corp.,
323 U.S. 373 (1945) 27

TABLE OF AUTHORITIES—Continued

Page

W.J.F. Realty Corp. v. Town of Southampton, 220 F. Supp. 2d 140 (E.D. N.Y. 2002) 17-18

Western Union Telegraph Co. v. Pennsylvania R. Co., 195 U.S. 540 (1904) 27

Wilkinson v. Pitkin County Board of County Commissioners, 142 F.3d 1319 (10th Cir. 1998) 19

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) ..... *passim*

Zinermon v. Burch, 494 U.S. 113 (1990) 12

United States Constitution

U.S. Const. amend. V 1

Statutes

28 U.S.C. § 1441(b) 21

§ 1447(c) 23

Miscellaneous

Berger, Michael M., & Kanner, Gideon, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 Urb. Law. 671 (2004) 13-14

Berger, Michael M., *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 Wash. U. J.L. & Pol'y 99 (2000) 3

TABLE OF AUTHORITIES—Continued

Page

Buchsbaum, Peter A., *Should Land Use Be Different? Reflection on Williamson County Regional Planning Board v. Hamilton Bank, Takings Sides on Takings Issues*, (Roberts ed. 2002) 13

Ely Jr., James W., *"Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2005 CATO Sup. Ct. Rev. (Mark K. Moller ed. 2005) 3, 28-29

Kassouni, Timothy V., *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. W. L. Rev. 1 (1992) 14

Mandelker, Daniel, et al., *Federal Land Use Law* (1998) 20-21

Overstreet, Gregory, *Update on the Continuing and Dramatic Effect of the Ripeness Doctrine on Federal Land Use Litigation*, 20 Zoning & Plan. L. Rep. 17 (1997) 3

Roberts, Thomas E., *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37 (1995) 3, 13

PETITION FOR WRIT OF CERTIORARI

Bruce Peters respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Opinion of the Seventh Circuit Court of Appeals is reported at — F.3d —, 2007 WL 2377385 (C.A. 7 (Ill.) 2007); it appears as Exhibit A to the petition. The decision of the Federal District Court for the Central District of Illinois is not reported; it appears as Exhibit B. A Magistrate Judge's Report and Recommendation, adopted by the district court, appears as Exhibit C.

JURISDICTION

The judgment of the Seventh Circuit Court of Appeals was entered on August 22, 2007. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall private property be taken for public use without just compensation."

STATEMENT OF THE CASE

This case challenges the idea, articulated in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985), that a private property owner must unsuccessfully pursue just compensation in state procedures in order to ripen a Fifth Amendment takings claim. This principle has generally been interpreted to require a would-be takings claimant to litigate a state law claim for just compensation in state court for ripeness purposes.

In the two decades since *Williamson County* was decided, it has become clear that there is no defensible justification for demanding a state court ruling as a ripeness predicate. Moreover, such a rule has proven to be totally incompatible with traditional quasi-jurisdictional rules—such as res judicata and the *Rooker-Feldman* doctrine—which generally bar federal review of claims rejected by state courts. Making federal takings review contingent on state court litigation also eviscerates the government's statutory ability to remove a federal takings claim. These problems—none of which were discussed in *Williamson County*—have produced significant jurisdictional confusion in the federal courts. For all these reasons,

lower federal courts[1] and commentators[2] have soundly criticized the state procedures ripeness rule.

Recognizing the severe dysfunction caused by *Williamson County*, the late Chief Justice William Rehnquist and three other Justices of this Court declared in *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323 (2005), that the Court should "reconsider" the rule that federal takings claimants "must first seek compensation in state courts" "[i]n an appropriate case." *Id.* at 352.

---

[1] *Asociacion De Subscripcion Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 17 (1st Cir. 2007) (the idea "that a federal takings claim is not ripe until the plaintiff has sought compensation through state procedures has drawn substantial criticism, including from Chief Justice Rehnquist in his concurring opinion in *San Remo* "); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 523 (6th Cir. 2004);*Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1302-03 (11th Cir. 1992).

[2] *See* James W. Ely Jr., *"Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2005 CATO Sup. Ct. Rev. 39-66 (Mark K. Moller ed. 2005); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37, 71 (1995) ("One understandable reaction to the prong two [state compensation procedures] requirement . . . is that it perpetrates a fraud or hoax on landowners. The courts say: 'Your suit is not ripe until you seek compensation from the state courts,'" but when the landowner does these things, the court says: "Ha ha, now it is too late.") Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 Wash. U. J. L. & Pol'y. 99, 102 (2000) (describing the state procedures rule as applied by lower courts as "bizarre" and not "what the *Williamson County* court intended because it is inherently nonsensical and self-stultifying"); Gregory Overstreet, *Update on the Continuing and Dramatic Effect of the Ripeness Doctrine on Federal Land Use Litigation*, 20 Zoning & Plan. L. Rep. 17, 27 (1997) (state procedures requirement has "dramatic" and "absurd" application).

(Rehnquist, C. J., concurring). On at least five occasions since *San Remo*, this Court has been asked to reconsider *Williamson County*, but has declined. *See, e.g., Rockstead v. City of Crystal Lake*, 486 F.3d 963 (7th Cir. 2007), *cert denied*, —S. Ct. —, 2007 WL 2565005 (2007); *McNamara v. City of Rittman*, 473 F.3d 633 (6th Cir. 2007), *cert. denied*, — S. Ct. —, 2007 WL 1385120 (2007); *Torromeo v. Town Of Fremont, NH*, 438 F.3d 113 (1st Cir. 2006); *cert. denied*, 127 S. Ct. 257 (2006); *Hoagland v. Town of Clear Lake*, 415 F.3d 693 (7th Cir. 2005), *cert. denied*, 547 U.S. 1004 (2006); *SFW Arecibo, Ltd. v. Rodriguez*, 415 F.3d 135 (1st Cir. 2005), *cert. denied*, 546 U.S. 1075 (2005). Chief Justice Rehnquist's suggestion that the Court overrule *Williamson County* will continue to generate requests for action on that suggestion.

The Court should settle the matter now by using this case to reconsider the state compensation ripeness predicate. Here, Bruce Peters (Peters) filed a federal takings claim in federal court after the Village of Clifton (Village) and private parties operating at its direction physically occupied his farm with an illegal and noxious sewer system, and without any offer of compensation. Appendix (App.) at A-2–A-3. The Seventh Circuit Court of Appeals held that *Williamson County*'s state compensation rule applied to Peters' physical takings claim, and that under that rule, *id.* at A-10–A-11, Peters had to unsuccessfully seek relief in state court under a state law takings provision before his claim would ripen. *Id.* at A-14–A-15. The lower court considered, but rejected Peters' argument that it should decline to follow *Williamson County*'s state

compensation procedures ripeness rule due to its "fundamental and untenable doctrinal flaws." *Id.* at A-16.

Peters now petitions this Court to overrule the state compensation ripeness predicate or, in the alternative, to exempt physical invasion takings claims.

A. Facts

Bruce Peters owns a large parcel of land (Peters' Property) within Iroquois County, Illinois, upon which he grows corn and soy crops. App. at C-2. Peters' Property lies just beyond the city limits of the Village of Clifton, which terminates at the western edge of Peters' Property. App. at A-2.

Alexander, Cox & McTaggert, Inc. (the Corporation) owns a parcel of agricultural property within the Village limits that is immediately to the west of Peters' Property. *Id.* At some point, someone put a line of drainage tile from the Village and under the Corporation's property. *Id.* at A-3.

There is a narrow waterway on Peters' Property that begins at a low spot at the western edge of Peters' Property, adjacent to the Village limits and the Corporation's land. *Id.* The waterway flows east and empties into a drainage ditch on Peters' Property within the regulatory control of Union Drainage District No. 2 of Danforth and Ashkum, Subdistrict No. 14. App. at C-2. For much of its length, the waterway is surrounded by an undisturbed "nature preserve." *Id.* at C-2.

Old drainage tile was once buried on Peters' Property parallel to, and occasionally under, the

waterway. *Id.* No recorded easement or judgment grants the Village or anyone else the right to occupy or use the tile on Peters' Property, or the land on which it rests. App. at C-2. The Village has no legal authority to condemn Peters' Property, lying beyond the Village's jurisdiction, for tile, sewage, or drainage purposes. *Id.* at C-3. The Village is not empowered to enter property outside its jurisdiction to maintain drainage ditches; nor was such authority delegated to the Village by Union Drainage District No. 2 of Danforth and Ashkum, Subdistrict No. 14. *Id.*

In the spring of 2005, James McTaggert (McTaggert) entered Peters' Property with the knowledge, consent, and authority of the Village Board of Trustees, but without Peters' consent, for the purpose of putting the Village's sewer line on Peters' Property. App. at A-3. McTaggert dug up the ancient tile on the Property and installed larger new tile. *Id.* After McTaggert installed the new tile on Peters' Property, he connected it to the Village's existing sewer line. App. at C-3. Through that line, the Village of Clifton then drained untreated sewage, exposing Peters' property and persons on it to hazardous and infectious waste materials. App. at A-3; C-2–C-3.

In installing the sewer line, McTaggert used heavy equipment that rendered a large area of Peters' Property unusable for growing crops. *Id.* McTaggert also used various poisons on the natural area above and around the newly installed and illegal sanitary sewer line, destroying thousands of dollars worth of [Peters'] trees and destabilizing [Peters'] drainage soil banks as a result. App. at A-3, C-3.

The unauthorized installation of the new tile on Peters' Property was intended to allow commercial

development of the Corporation's property by increasing the Village and the Corporation's ability to drain water and sewage through that property. App. at A-3. The sewer outlet thus constructed on Peter's Property continues to disperse sewage and hazardous waste across his land without his consent. *Id.*

B. Procedure

1. District Court

In 2005, Peters filed suit in the United States District Court for the Central District of Illinois, bringing an action pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §§ 1983 and 1988. App. at A-4. Peters specifically complained that the Village had unconstitutionally taken his property without just compensation, and continued to do so, by occupying his property for the Village's illegal sewage drainage system. *Id.* at A-4. Peters sought an injunction to end the health hazard posed by the Village's illegal and ongoing taking, compensatory damages, and "other further relief." *Id.*

The Village of Clifton filed a motion to dismiss. *Id.* The motion sought dismissal of Peters' complaint under Fed. R. Civ. P. 12(b)(1) for lack of jurisdiction on the ground that Peters' takings claim was not ripe. *Id.*

A Magistrate Judge subsequently issued a Report and Recommendation on the ripeness defense. App. C. The Magistrate concluded that the court lacked jurisdiction because Peters had not sought just compensation in Illinois state courts before filing the claim in federal court. *Id.* at C-12-13. The Magistrate recommended dismissal for this reason, *id.*, and the

district court accepted the Magistrate's recommendation in full. *See* App. B.

2. The Seventh Circuit's Decision

In the Seventh Circuit, Peters argued that the court should decline to apply *Williamson County*'s state procedures requirement to his physical takings claim because its fundamental flaws had been exposed in Justice Rehnquist's *San Remo* concurrence. App. at A-15. Peters further argued that, if such a requirement remains generally viable after the *San Remo* decision, it should not be applied in his case because the State of Illinois offered no adequate or certain compensatory procedure to relieve the physical occupation of his farmland by the Village. *Id.* at A-6–A-8.

On August 22, 2007, the Seventh Circuit issued a published decision rejecting Peters' contentions and affirming the district court. The Seventh Circuit initially held that, while a physical invasion takings claim automatically satisfies *Williamson County*'s first ripeness prong—the need for a final decision—the use of state compensation procedures was necessary to ripen the physical takings claim. App. at A-11.

The court specifically held that Peters was required to prosecute a takings claim arising under the State of Illinois' Constitution in state courts before his federal claim would mature. The court explained:

> Some of our sister circuits also have taken the view that a selfexecuting provision of a state's constitution may constitute a sufficiently reasonable, certain and adequate remedy to satisfy the Fifth Amendment and, under *Williamson County*, is likewise sufficient to

> require the plaintiff to proceed in state court before raising a federal takings claim.

App. at A-14, n.6.

Finally, the court rejected Peters' argument that no state procedures should be required because *Williamson County* is flawed:

> Mr. Peters contends that *Williamson County*'s requirements are prudential and insufficient to support the district court's decision that it lacked subject matter jurisdiction in this case. He relies largely on Chief Justice Rehnquist's concurring opinion in *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 348-52, 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005), which, Mr. Peters contends, "exposed" *Williamson County*'s "fundamental and untenable doctrinal flaws." Appellant's Br. at 10 n.2.
>
> *Williamson County*'s ripeness requirements are prudential in nature. *See Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733-34 & n.7, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (1997); *Forseth*, 199 F.3d at 368 n.7. The prudential character of the *Williamson County* requirements do not, however, give the lower federal courts license to disregard them. The Supreme Court has determined, as a matter of law, when federal takings claims are ripe and has set forth a rule in *Williamson County* that this court is bound to follow. In the absence of compliance with

> *Williamson County*, the district court correctly dismissed this action.

App. at A-16.

REASONS FOR GRANTING THE WRIT

The decision below raises an important question as to whether a federal takings claimant must unsuccessfully seek just compensation in state courts, because such a doctrine has no plausible justification and produces an unpredictable and untenable jurisdictional framework. *See San Remo*, 545 U.S. at 352 (Rehnquist, C. J., concurring). If failed state compensation procedures remain a viable ripeness predicate, the decision below raises the important issue of whether physical occupation takings claims, long considered to ripen for federal review at the moment of the invasion, and not at issue in *Williamson County*, should be subject to such a rule. Both issues warrant reconsideration of *Williamson County* and the granting of this Petition.

I

THE STATE PROCEDURES REQUIREMENT LACKS ANY DOCTRINAL JUSTIFICATION AND CAUSES UNANTICIPATED AND UNACCEPTABLE JURISDICTIONAL CONFUSION

In *Williamson County*, this Court considered a claim that a land use regulation had caused a regulatory taking by depriving the property owner of economically beneficial use of land. 473 U.S. at 175,

185. The Court initially ruled that a regulatory takings claim would not ripen until there was a "final decision." *Id.* at 186-87. The Court held that the *Williamson County* plaintiff failed to meet the "final decision" test. *Id.* at 188-90. Although this effectively decided the case, the *Williamson County* Court went on to declare that ripeness also required the federal takings claimant to unsuccessfully seek just compensation though state procedures to secure federal review. 473 U.S. at 194, 197. It is this second requirement that is at issue here.

A. The Requirement That a Federal Takings Plaintiff Must Complete and Lose State Court Litigation to "Ripen" a Federal Takings Claim Has No Plausible Support

Sometimes a "[w]ould-be doctrinal rule or test finds its way into [this Court's] case law" by repetition, despite the absence of any firm doctrinal basis for that rule. *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 531 (2005). As the late Chief Justice Rehnquist emphasized in *San Remo*, the notion that a federal takings litigant must sue for compensation in state court to "ripen" a federal takings claim is a prototypical example of this phenomenon. *San Remo*, 545 U.S. at 349 (Rehnquist, C. J., concurring) ("It is not clear to me that *Williamson County* was correct in demanding that . . . the claimant must seek compensation in state court before bringing a federal takings claim in federal court.").

Williamson County relied primarily on the character of the Takings Clause in adopting the state

procedures ripeness concept.[3] 473 U.S. at 194. The requirement was said to arise especially from the observation that a taking is unconstitutional only when it is "without just compensation." *Id.* at 194-95. According to *Williamson County*, this "without just compensation" condition means that a claimant must be denied compensation in state procedures before a federal takings claim is complete and ripe. *Id.*

---

[3] *Williamson County* also analogized to *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984), and *Parratt v. Taylor*, 451 U.S. 527 (1981). Both analogies are ill-considered. *San Remo*, 545 U.S. at 352, 349 n.1 (Rehnquist, C. J., concurring).

Unlike in *Williamson County*, *Monsanto* did not involve a federal claim for just compensation; it involved a claim for injunctive and declaratory relief. As a brief amicus curiae cited in Justice Rehnquist's *San Remo* concurrence explains, *Monsanto*'s rejection of injunctive relief is inapposite to the (*Williamson County*) issue of whether federal claims for just compensation are premature prior to state court litigation:

> [T]he [Monsanto] company's request for equitable relief was not merely premature, it was not available at all. In other words, there was nothing the company could do to 'ripen' its claims for equitable relief: that claim simply had no merit, period.

San Remo, Brief for Elizabeth J. Nuemont, et. al. as Amici Curiae, at 12.

Parratt v. Taylor, 451 U.S. 527, is equally inapposite because it is a procedural due process decision arising (unlike in the typical takings case) from a random and unauthorized deprivation of property. *Id.* at 541. Since *Williamson County*, this Court has strictly limited *Parratt* to random deprivations where pre-deprivation process is impossible. *Zinermon v. Burch*, 494 U.S. 113, 129-30 (1990). For this and other reasons, *Parratt* has nothing to say about when authorized takings become ripe. *San Remo*, 545 U.S. at 349 n.1 (citing Brief for Defenders of Property Rights et al. as Amici Curiae 9-12; Brief for Elizabeth J. Neumont et al. as Amici Curiae 10-14).

This logic is fatally flawed. The problem is not the starting point—that an unconstitutional taking exists only if the taking is "without just compensation." This is obvious and noncontroversial. But the subsequent conclusion that state *court* procedures are necessary for compensation to be absent is illogical and baseless.

The Takings Clause requires just compensation to be paid for a taking, not that a property owner be given a right to litigate for years in state court. *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304, 315 (1987) ("[G]overnment action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation.'"). And there is nothing in the text of the Takings Clause indicating that a taking is "without just compensation" only when a state *court* says so. *See* Peter A. Buchsbaum, *Should Land Use Be Different? Reflection on Williamson County Regional Planning Board v. Hamilton Bank, Takings Sides on Takings Issues*, 473-74 (Roberts ed. 2002) ("[T]his underlying premise [that the government has not acted] illegally until you ask for compensation and then it is denied is, of course, untrue."). Thomas E. Roberts, *supra* at 72 ("The language of the Fifth Amendment does not dictate this [state procedures] rule."); Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 Urb. Law. 671, 695-96 (2004) (The Fifth Amendment "does not say 'nor shall private property be taken for public use without just compensation as finally determined by suing the municipal defendant in state court.'").

Instead, it is far more natural to read "without just compensation" to refer to the presence or absence of compensation *at the time the government engages in the taking*, rather than after a state court rules. Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. W. L. Rev. 1, 43 (1992) ("[I]t makes little sense to require property owners to seek just compensation from the courts, as opposed to the governmental entity which imposed the regulation."); Berger & Kanner, *Shell Game!*, *supra*, at 694 ("There is nothing in either logic or the language of the Fifth Amendment that requires municipal nonpayment [of compensation] to be certified by a state court before it is complete.").

And, in fact, this Court has repeatedly held that it is the time of the taking that determines the right to just compensation. For instance, in *United States v. Dickinson*, the Court declared: "[T]he land was taken when it was taken and an obligation to pay for it then arose." 331 U.S. 745, 751 (1947). Then, in the 1980 case of *United States v. Clarke*, the Court repeated that "the usual rule is that the time of the invasion constitutes the act of taking and '[i]t is that event which gives rise to the claim for compensation.'" 445 U.S. 253, 258 (1980) (quoting *United States v. Dow*, 357 U.S. 17, 22 (1958)). Only one year before *Williamson County* was decided, this Court affirmed that a property "owner has a right to bring an 'inverse condemnation' suit to recover the value of the land *on the date of the intrusion* by the Government." *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 5 (1984) (emphasis added).

If the duty to pay just compensation accrues at the time of a taking, the issue of whether the taking is "without just compensation" should also be ascertained at that point, and a federal takings claim ripened then. *Williamson County* ignores this established doctrine in concluding that post-taking state court litigation is necessary to render a takings claim complete and actionable. *San Remo*, Brief Amicus Curiae of Elizabeth J,. Neumont, at 8 ("*Williamson County* deviated sharply from the traditional understanding of [the Just Compensation] Clause" in "asserting that a property owner's monetary claim under the Just Compensation Clause does not accrue 'until just compensation has been denied by the state judicial system.'").

Not only is there no textual or precedential foundation for requiring a federal takings plaintiff to ask the state courts for compensation prior to raising a federal claim, such a rule makes no logical sense in most takings cases. These cases are typically directed at a local government, not the state. Why does a property owner challenging an invasion of property by a city or county, one without any contemporaneous provision of compensation, have to ask the *state* for compensation before the property owner can sue the local government in federal court? After all, (1) the state typically "assumes no liability" for takings caused by local governments, *Caldwell v. Commissioners of Highways of Towns of Scott, Mahomet, and Sangamon*, 94 N.E. 490, 493 (Ill. 1911); and (2) local governments are generally subject to constitutional suit in federal court in their own right under 42 U.S.C. § 1983. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690-92 (1978).

In short, there is simply no textual, jurisprudential, or logical reason for construing the Just Compensation Clause to require state court litigation before a federal takings claim can be adjudicated. Moreover, when this concept was sanctioned in *Williamson County*, it was entirely unnecessary to the outcome of that case and approved without direct briefing. *See* 473 U.S. at 188-90 (deciding that the takings claims were unripe for lack of a final decision prior to articulating the state procedures requirement). The state procedures requirement was "mistaken," *San Remo*, 545 U.S. at 348 (Rehnquist, C. J., concurring), and a rule that is "not correct when it was decided and . . . not correct today . . . ought not to remain binding precedent." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

B. The State Compensation Requirement Creates a Contradictory and Unpredictable Jurisdictional Framework

The mistaken state procedures ripeness requirement is particularly objectionable because it is unworkable in practice. Indeed, in combination with other, more established jurisdictional doctrines, such as res judicata and removal, the state procedures rule has created a completely dysfunctional jurisdictional regime.

1. The State Compensation Procedures Predicate Conflicts with Res Judicata Principles That Bar Federal Relitigation of Failed State Court Claims

The most long-standing (quasi) jurisdictional problem arising from *Williamson County*'s notion that a federal takings claim ripens upon completed state procedures is caused by the interaction of such a rule with res judicata principles. *Williamson County* indicates that failed state court litigation will open the federal courthouse door to a federal takings claim. 473 U.S. at 194-96. On the other hand, res judicata and collateral estoppel principles—applied in federal courts under the aegis of the Full Faith and Credit Act—generally hold that cases previously adjudicated in state courts cannot be re-tried in the federal courts. *See Allen v. McCurry*, 449 U.S. 90, 94 (1980).

The result is that compliance with *Williamson County*'s state procedures requirement often does not have the advertised ripening effect, but instead completely terminates the takings claim. As one court explained:

> *Williamson* and its progeny place Plaintiffs in a precarious situation. Plaintiffs must seek redress from the State court before their federal taking claims ripen, and failure to do so will result in dismissal by the federal court. However, once having gone through the State court system, plaintiffs who then try to have their federal claims adjudicated in a federal forum face, in many cases, potential preclusion defenses. This appears to preclude completely litigants such as those in the case

> at bar from bringing federal taking claims in a federal forum, providing a federal forum only by way of the United States Supreme Court review of a State court judgment.

W.J.F. Realty Corp. v. Town of Southampton, 220 F. Supp. 2d 140,146 (E.D. N.Y. 2002).

This "precarious situation" is compounded by the fact that *Williamson County* appears not to have anticipated either the application of res judicata or its result in preventing claims ripened by state procedures from being heard in the federal courts:

> The barring of the federal courthouse door to takings litigants seems an unanticipated effect of *Williamson County*, and one which is unique to the takings context, as other § 1983 plaintiffs do not have the requirement of filing prior state-court actions.

DLX, 381 F.3d at 519-21.

As described by the Seventh Circuit:

> Although the *Williamson* line of cases that requires the property owner to seek compensation in the state courts speaks in terms of "exhaustion" of remedies, that is a misnomer. For if . . . the property owner goes through the entire state proceeding, and he loses, he cannot maintain a federal suit. The failure to complain of the taking under federal as well as state law is a case of "splitting" a claim, thus barring by virtue of the doctrine of res judicata a subsequent suit under federal law.

Rockstead, 486 F.3d at 968.

Federal courts have long struggled with this tension between the ripeness or exhaustion purpose of *Williamson County*'s state compensation requirement and res judicata principles. *See Wilkinson v. Pitkin County Board of County Commissioners*, 142 F.3d 1319, 1325 n.4 (10th Cir. 1998) ("It is difficult to reconcile the ripeness requirement of *Williamson* with the laws of res judicata and collateral estoppel."). Some courts have opted for a strict application of res judicata, a course that negates federal review of takings claims despite the plaintiff's complete compliance with *Williamson County*. *Id.*; *see also*, *Palomar Mobilehome Park Ass'n. v. City of San Marcos*, 989 F.2d 362, 364-65 (9th Cir. 1993). Other courts, emphasizing that *Williamson County*'s ripeness rules hold out the promise of federal review, have attempted to neutralize res judicata so as to ensure that compliance with *Williamson County* indeed renders takings claims fit for federal review. *See, e.g.*, *DLX*, 381 F.3d at 519-21; *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d at 1303-06.

In *San Remo*, this Court rejected the courts' attempts to craft res judicata exceptions that would allow takings claims in federal court after compliance with *Williamson County*. 545 U.S. at 338, 344-45. Yet, in so doing, *San Remo* did *not* alter *Williamson County* or its instruction that unsuccessful state court compensation procedures will ripen federal review. As a result, the current jurisdictional regime continues to offer takings plaintiffs and federal courts two contradictory rules. On the one hand, *Williamson County* says that unsuccessful pursuit of a just compensation claim in state court ripens federal review of a federal takings claim. 473 U.S. at 194-96. On the

other hand, as construed by *San Remo*, the Full Faith and Credit Act declares that prosecution of just compensation claims in state court entirely precludes subsequent federal review of a takings claim. 545 U.S. at 344-45.

Williamson County accordingly functions as a trap, commanding would-be federal takings plaintiffs to take steps to secure federal review that actually permanently bar such review due to res judicata.[4] Nothing in *Williamson County* supports such a doctrine. *Dodd v. Hood River County*, 59 F.3d 852, 861 (9th Cir. 1995) ("We disagree . . . with the suggestion that *Williamson County* is a thinly-veiled attempt by the Court to eliminate the federal forum for Fifth Amendment taking plaintiffs . . . ."); Daniel Mandelker, et al., *Federal Land Use Law* 4A-23 (1998) ("The Supreme Court could hardly have intended the ripeness rules to become a trap for federal litigants."). Since *San Remo* repudiated a loosening of res judicata

---

[4] A similar problem can occur through a conflict between *Williamson County* and the *Rooker-Feldman* doctrine. The *Rooker-Feldman* doctrine prevents federal courts from entertaining suits "complaining of injuries caused by state court judgments and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 281 (2005). This doctrine sits uneasily with the principle that takings claimants must lose in state court on a compensation claim before they can challenge lack of compensation in federal court. Some courts have held that compliance with *Williamson County* indeed triggers *Rooker-Feldman* and prevents, rather than matures, federal review. *See, e.g., Johnson v. City of Shorewood*, 360 F.3d 810, 818-19 (8th Cir. 2000). Thus, "[t]he catch-22 of the 'Williamson trap' discussed . . . with respect to res judicata is also evident with respect to the *Rooker-Feldman* doctrine." *DLX*, 381 F.3d at 518 n.3.

in the takings context, the only way to correct the jurisdictional confusion caused by *Williamson County*'s state procedures requirement is to directly reconsider it.

2. The State Procedures Requirement Conflicts with Removal Jurisdiction, and Defendants May Be Financially Punished When They Attempt Removal of a Federal Takings Claim Prior to State Procedures

Williamson County's state litigation ripeness requirement creates just as much jurisdictional confusion and absurdities when a government defendant attempts to remove a federal takings claim as it does when a plaintiff attempts to file a claim after failed state court litigation. The removal problem arises from two realities: (1) *Williamson County*'s ripeness predicates are typically considered to be a jurisdictional hurdle, *see, e.g.*, *Bigelow v. Michigan Dep't of Natural Res.*, 970 F.2d 154, 157 (6th Cir. 1992) ("If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed.") and (2) a defendant must demonstrate jurisdiction in order to remove a federal claim from state court. 28 U.S.C. § 1441(b) (removal depends on "original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States"). Thus, if a federal takings plaintiff cannot secure federal jurisdiction before a state court denies a just compensation claim, then defendants logically also cannot remove a federal takings claim when filed in state court, though it has the appearance of a federal issue. *See City of Chicago v. Int'l College of Surgeons*,

522 U.S. 156, 163 (1997) ("The propriety of removal thus depends on whether the case originally could have been filed in federal court.") (citation omitted).

Many courts have indeed concluded that lack of compliance with *Williamson County* bars removal of a Fifth Amendment takings claim. *Moore v. Covington County Comm'n*, 2007 WL 1771384, *3 (M.D. Ala. 2007) ("Because the defendants removed this case to federal court before the plaintiffs could pursue their claims in state court, this court lacks jurisdiction" and "defendants have not met their burden of establishing federal question jurisdiction."); *Doney v. Pacific County*, 2007 WL 1381515, *4 (W.D. Wash. 2007) ("[B]ecause Plaintiffs have not adjudicated an inverse condemnation claim in state court, the federal takings claim is not yet ripe and should accordingly be remanded to state court" and removal denied.).

Since defendants have only 30 days to remove—a much shorter period than the time it takes to obtain a state court denial of compensation—holding federal takings jurisdiction subject to a state's denial of compensation means that takings removal should never occur. Amazing as it seems, a takings claim with the appearance of a classic federal question—one arising under the Constitution no less—often does not function as a federal question for either defendants or plaintiffs due to the effect of *Williamson County*'s required state compensation procedures. *See Carrollton Properties, Ltd. v. City of Carrollton, Texas*, 2006 WL 2559535, *2 (E.D. Tex. 2006) (denying removal upon concluding that "[p]laintiffs have not unsuccessfully pursued just compensation in state court, thus the claim is not ripe, and it is not a federal question"). Moreover, financial penalties await

defendants who attempt to remove a takings claim on federal question grounds prior to compliance with *Williamson County*. *See* 28 U.S.C. § 1447(c). ("An order remanding the case [for lack of jurisdiction] may require payment of just costs and . . . attorney fees, incurred as a result of the removal"); *see, e.g.*, *Quivira Village, LLC v. City of Lake Quivera, Kansas*, 2004 WL 1701070, *2 (D. Kan. 2004) (awarding fees for wrongful removal of takings claim because the defendant "was on notice that the federal claims were not ripe").

Some federal courts, wrongly assuming that a Fifth Amendment takings claim must be removable as a federal issue, have allowed permissive removal. But this only delays the *Williamson County* ripeness issue, and gives rise to yet another Kafkaesque jurisdictional nightmare, one where a takings plaintiff is dragged by a defendant into a federal forum closed to the plaintiff, forced to litigate there (perhaps for years), only to be kicked back on appeal to the state court where it all started due to lack of *Williamson County* ripeness. *See Sandy Creek Investors, Ltd. v. City of Jonestown, Tex.*, 325 F.3d 623, 625-26 (5th Cir. 2003) (removal allowed, landowner wins on merits in trial court, but on appeal, Fifth Circuit remands case to state court where initially filed due to lack of compliance with *Williamson County*); *Reahard v. Lee County*, 30 F.3d 1412, 1418 (11th Cir. 1994) (remanding removed takings claim back to state court after five years of federal litigation, including on the merits, and two circuit court appellate opinions, based on lack of state court compensation proceedings).

Williamson County's state procedures requirement has created a truly unintelligible and unfair federal jurisdictional framework, turning it into a scheme that

confuses courts and waylays litigants who in good faith do what the law says is required for federal jurisdiction, only to find out that the law is the opposite of what it seems. Due to res judicata and *Rooker-Feldman*, compliance with *Williamson County* usually has no ripening effect and instead effectively ends the federal takings claim. *San Remo*, 545 U.S. at 350-51 (Rehnquist, C. J., concurring). This in turn deprives the plaintiffs of their Seventh Amendment right to a jury trial. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 694 (1999). On the other hand, government defendants are deprived of their statutory ability to remove constitutional takings claims to a federal forum and financially punished if they try.

The impact of the state procedures requirement on takings jurisdiction goes beyond "dramatic," *San Remo*, 545 U.S. at 352 (Rehnquist, C. J., concurring); it is pernicious, particularly because it lacks any remotely plausible justification. This Court should take this case to overrule *Williamson County*'s state litigation requirement, and in this way, provide courts and litigants with a coherent, predictable, and just set of jurisdictional rules. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 63 (1996) ("[W]hen governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'").

II

THE DECISION BELOW RAISES AN IMPORTANT ISSUE AS TO WHETHER THE STATE COMPENSATION PROCEDURES REQUIREMENT—DESIGNED TO APPLY IN THE REGULATORY TAKINGS CONTEXT—ALSO APPLIES TO BAR TRADITIONAL PHYSICAL TAKINGS CLAIMS FROM FEDERAL COURTS

If *Williamson County* is to be left intact, the decision of the Seventh Circuit raises an important issue as to whether the state compensation ripeness requirement applies to physical invasion takings claims. *Williamson County* articulated both of its ripeness requirements—the final decision and state compensation procedures rules—in the context of a regulatory takings claim. *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. at 733-34. (*Williamson County* identified "two independent prudential hurdles to a *regulatory* takings claim brought against a state entity in federal court.") (emphasis added). Nevertheless, the court below held that Peters' physical takings claim was subject to the state procedures requirement, App. at A-11, and barred from federal court for that reason. *Id.* at A-14–A-15. This understanding effectively closes the federal courts to the most established Fifth Amendment takings claims—those arising from a direct physical invasion of property—despite the long history of federal review of these constitutional claims, and without a legitimate doctrinal basis. This situation warrants this Court's review.

A. Applying the Regulatory Takings State Procedures Requirement to Physical Takings Claims Ends the Federal Courts' Historic and Legitimate Role in Fifth Amendment Physical Takings Law

1. Physical Taking Claims Have Historically Raised Constitutional Questions Worthy of Federal Scrutiny

Federal "jurisprudence involving condemnations and physical takings is as old as the Republic . . ." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002). This jurisprudence has "long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the [Fifth Amendment's] Takings Clause." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). More particularly, this Court has construed physical takings claims to raise important individual rights issues arising directly under the Constitution. *See Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) (recognizing the right to exclude others as a fundamental and constitutionally protected property right).

Indeed, it was a concern that states might leave physical takings uncompensated which precipitated this Court's (at the time, revolutionary) decision to subject the states to the Fifth Amendment by incorporating it into the Fourteenth Amendment. *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 230, 235 (1897). After this event, the federal courts' involvement in federal takings litigation appeared

settled. *See, e.g., Raymond v. Chicago Union Traction Co.*, 207 U.S. 20 (1907) (A claim that a states' enforcement of a confiscatory tax reassessment violated the Fourteenth Amendment constitutes a Federal question beyond all controversy."'). Accordingly, for most of this nation's history, federal courts have had a significant and non-controversial role in the development of physical takings law. *See Western Union Telegraph Co. v. Pennsylvania R. Co.*, 195 U.S. 540, 570 (1904) (holding on writ of certiorari to the Third Circuit Court of Appeals that a right-of-way "cannot be appropriated in whole or in part except upon the payment of compensation"); *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945); *Kaiser Aetna*, 444 U.S. at 176-80 (holding on writ of certiorari to the Ninth Circuit that the government's demand for public access over a private pond was a compensable physical taking where the servitude deprived the landowner of the essential right to exclude others).

In *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278 (1913), this Court seemed to directly sanction the federal courts' role. That decision specifically rejected a contention that the federal courts had no power to hear a deprivation of property claim under the Fourteenth Amendment until the state courts had passed on the issue. A principal reason for this decision was that the asserted limit on federal review would "cause the state courts to become the primary source for applying and enforcing the Constitution of the United States in all cases covered by the 14th amendment." *Id.* at 285. Yet, what was unacceptable in *Home Tel. & Tel. Co.* will become reality in the physical takings context if those types of takings

claims must be litigated in state courts for federal ripeness.

2. Applying the Regulatory Takings State Procedures Requirement to Physical Takings Ends Federal Involvement in That Important Area of Constitutional Law

When physical takings claims are subject to the state compensation litigation requirement, they cannot be filed in federal court before or after compliance with that requirement; federal courts are accordingly divested of any role in the development of physical takings law. *See, e.g., Rockstead*, 486 F.3d at 967. This can be quickly demonstrated by reference to the case at hand.

If, as the lower court held, Peters' physical takings claim must be "ripened" by state court litigation, that claim cannot be invoked in the federal court in the first instance. App. A-14–A-15; *see also, Rockstead*, 486 F.3d at 965. Nor can it be invoked if Peters followed the lower court's direction to prosecute takings litigation in state court, as that action would initiate res judicata. *Id.* at 967. Thus, construing *Williamson County*'s regulatory takings ripeness requirements to apply to all takings effectively ends federal review of physical occupations of private property—intrusions long subject to searching federal oversight.

> No other important right is dealt with in such a shabby manner. One might have thought that all the provisions of the Bill of Rights were entitled to protection in the federal courts. Unfortunately, that will not be the case unless the Court . . . decides to pursue

> [Chief Justice] Rehnquist's invitation and modifies the *Williamson County* ripeness test.

James W. Ely, Jr., *supra*, at 68-69.

This Court should grant the petition to consider the important issue of whether federal courts are to have no role in the enforcement of the Constitution of the United States whenever it is claimed that a government has caused a physical taking.

B. Applying the State Compensation Rule to Physical Takings Conflicts with This Court's Clear Demarcation Between Regulatory and Physical Takings

The de facto relegation of physical takings claims to state courts through the state compensation rule is especially suspect because it arises from a scheme meant for regulatory takings.

On many occasions, this Court has emphasized that physical takings are different from regulatory takings. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. at 321-23; *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 233-34 (2003). The distinction is not merely theoretical; rather, this Court has declared that it determines the precedent to be applied in any particular takings case:

> The longstanding distinctions between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a

> claim that there has been a "regulatory taking," and vice versa.

Tahoe-Sierra, 535 U.S. at 323.

This demarcation extends to ripeness issues. For instance, as the lower court recognized, *Williamson County*'s "final decision" ripeness predicate for regulatory takings does not apply to physical takings claims. App. at A-11. The basis for such a distinction is that a physical takings claim typically targets a governmental action easily identified as an infringement on private property, while a taking by oppressive regulation may become apparent only after extended administrative decision-making. *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 91 (1st Cir. 2003) ("In a physical taking case, the final decision requirement is relieved or assumed because "'[w]here there has been a physical invasion, the taking occurs at once, and nothing the [governmental actor] can do or say after that point will change that fact.'") (quoting *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1281 n.28 (9th Cir. 1987)).

The same sort of observations might justify an exemption for physical takings claims when it comes to requiring state compensation procedures as a ripeness condition. *Kruse v. Village of Chagrin Falls, Ohio*, 74 F.3d 694, 700-01 (6th Cir. 1996). This is so particularly where it has been traditionally understood that a physical taking is identifiable and triggers a right to just compensation at the time of the invasion. *United States v. Clarke*, 445 U.S. at 258 (the time of the invasion constitutes the act of taking and "'gives rise to the claim for compensation'"). At the least, there is no obvious reason why physical takings should be treated differently than regulatory takings in every

aspect of the law except the state compensation procedures requirement.

In assuming that Peters' physical occupation claim was subject to the state compensation procedures rule articulated as part of regulatory takings law, the Seventh Circuit decision conflicts with this Court's demarcation between regulatory and physical takings doctrine. This Court should grant the petition to clarify that physical takings, legally and historically distinct from regulatory takings, are not subject to regulatory takings ripeness barriers which entirely bar federal involvement in physical takings law.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: November, 2007.

Respectfully submitted,

*J. DAVID BREEMER
Counsel of Record
R.S. RADFORD
Pacific Legal Foundation
3900 Lennane Drive,
Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Petitioner

Appendix A-1

No. 06-3735

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

BRUCE PETERS,

Plaintiff-Appellant,

v.

VILLAGE OF CLIFTON,
an Illinois Municipal Corporation,
ALEXANDER COX & McTAGGERT,
Incorporated and JOSEPH McTAGGERT,

Defendants-Appellees.

Argued May 1, 2007
Decided Aug. 22, 2007

Background: Property owner sued village under § 1093, [sic] [§ 1983] alleging that they committed unconstitutional taking of his property by trespassing upon it in order to expand village's sewage discharge system. The United States District Court for the Central District of Illinois, Michael P. McCuskey, Chief Judge, 2006 WL 1044082, dismissed action. Property owner appealed.

Holding: The Court of Appeals, Ripple, Circuit Judge, held that landowner's pursuit of remedies in Illinois courts would not be futile, and, thus, his failure to pursue such remedies rendered his takings claim unripe.

Affirmed.

Before RIPPLE, MANION and WILLIAMS, Circuit Judges.

RIPPLE, Circuit Judge.

Bruce Peters brought this action under 42 U.S.C. § 1983 against the Village of Clifton ("Village"), Alexander, Cox & McTaggert, Inc. ("ACM") and Joseph McTaggert. He alleged that the defendants had trespassed on his property in order to expand the Village's sewage discharge system and, in so doing, had committed an unconstitutional taking of his property in violation of the Fifth and Fourteenth Amendments. On the Village's Rule 12(b)(1) motion, the district court dismissed the action. Mr. Peters appealed. We agree that the district court properly dismissed the action, and, accordingly, we affirm the judgment of the district court.

A. Facts

Mr. Peters owns a parcel of agricultural land just outside the eastern edge of the village limits of Clifton, Illinois. ACM owns agricultural property within the village limits that directly abuts Mr. Peters' land. Running eastward along Mr. Peters' property is a waterway that empties into a drainage ditch. At some unknown time in the past, prior to Mr. Peters' ownership of the property, farm drainage tile had been buried on Mr. Peters' land. The tile was parallel to and beneath the waterway. The Village had an existing sewage line in the vicinity for some time. The line ran under ACM's property.

Mr. Peters claims that, in 2005, the private defendants, at the instruction of the Village, trespassed onto his land, dug up the old, non-functioning sewer tile and installed new, larger tile. This newly-installed tile, Mr. Peters contends, was then connected to the Village's existing sewage tile "at or about the property line" between his land and that owned by ACM. R.1 at 4. The Village thus created, he maintains, an "unregulated[,] unlicensed sanitary sewer system discharging sewage through the farm tile within [Mr. Peters'] property." *Id.* at 3. Mr. Peters believes that the Village made these improvements in an attempt to make the adjacent land within the Village boundaries suitable for development.

Mr. Peters claims that, to install the new tile, ACM, with the consent of the Village, came onto his property and used "various poisons on the nature preserve bordering the above ground drainage ditch, underneath which is the [Village's] illegal sanitary sewage line." He claims that this action destroyed trees and destabilized the land. *Id.* at 4. Mr. Peters claims that acres of his farmland were rendered unsuitable for agricultural uses because of soil compaction and drainage of "untreated sewage and waste materials." *Id.* at 5.

B. District Court Proceedings

Mr. Peters filed a complaint in the United States District Court for the Central District of Illinois. He asserted that the defendants had committed an unauthorized taking of his property in violation of the Takings Clause of the Fifth Amendment of the Constitution as made applicable to the states through

the Fourteenth Amendment. *See Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 233, 236-37, 17 S. Ct. 581, 41 L. Ed. 979 (1897). Mr. Peters requested compensatory damages for the taking and a permanent injunction forbidding the Village from discharging any materials through the drainage tiles on his property.[1]

The Village moved to dismiss the action under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, claiming that the action was not ripe. Specifically, the Village contended that, before Mr. Peters could assert a takings claim in federal court, he was required first to seek compensation through appropriate state channels. This course was mandated, in the Village's view, by the decision of the Supreme Court in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson County*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed.2d 126 (1985).

In his memorandum opposing the motion to dismiss, Mr. Peters maintained that the Village was not a home rule municipality under Illinois law, and, therefore, had no eminent domain power with respect to his land. Mr. Peters further asserted that, because of the Village's status, he could not institute inverse condemnation proceedings against it and therefore was exempted from *Williamson County*'s exhaustion requirement on futility grounds.

---

[1] Mr. Peters claims that, in the acts giving rise to his complaint, both the Village and the private defendants were acting under color of state law for purposes of liability under 42 U.S.C. § 1983.

The district court agreed with the Village that, under *Williamson County*, Mr. Peters was obligated to show either that he had exhausted state remedies or that those remedies were unavailable to him. The district court assumed for purposes of its analysis that the Village had no eminent domain powers under Illinois law. The court concluded, however, that, if the only remedy the state provided for a taking was dependent upon a particular jurisdiction's home rule status, the lack of an available remedy in a case such as this one would violate the Takings Clause of the Illinois Constitution. The district court held that, absent explicit authority from the Illinois courts that no state remedy was available for takings effected by non-home rule jurisdictions, Mr. Peters was required to seek compensation from the state, whether titled an inverse condemnation proceeding or a suit in tort.[2] Because Mr. Peters had not availed himself of state procedures for obtaining compensation, the court concluded that his claim for a violation of the Takings Clause of the Fifth Amendment was not ripe. Accordingly, the district court dismissed the case for lack of subject matter jurisdiction.[3]

---

[2] *See* R.22 (Report of Recommendation of Magistrate Judge, adopted by the district court at R.25).

[3] On Mr. Peters' first attempt to appeal this decision, this court dismissed the appeal for lack of subject matter jurisdiction because the judgment was not a final resolution of all claims against all parties or an authorized interlocutory appeal. On Mr. Peters' motion, the district court amended its judgment to dismiss all claims against all parties for lack of subject matter jurisdiction, and Mr. Peters timely appealed.

II

DISCUSSION

We review de novo a district court's order dismissing a case for lack of subject matter jurisdiction under Rule 12(b)(1). *Small v. Chao*, 398 F.3d 894, 897 (7th Cir. 2005). We must accept all facts stated in the complaint as true and must draw all reasonable inferences in the light most favorable to the plaintiff. *Tricontinental Indus., Ltd. v. PricewaterhouseCoopers, LLP*, 475 F.3d 824, 833 (7th Cir. 2007).

A.

We pause at this point to set forth in some detail Mr. Peters' arguments. In support of his contention that *Williamson County* does not require exhaustion in this case and that therefore the matter is ripe for federal adjudication, Mr. Peters makes three principal, but interrelated, arguments. First, Mr. Peters claims that *Williamson County*, by its terms, is limited to suits for *compensation*, not suits seeking to *enjoin* an "unlawful" taking, and, therefore, at minimum, his claim for injunctive relief should proceed immediately. Next, he claims that *Williamson County* does not require him to pursue speculative and unproven compensation procedures available in Illinois. Finally, he contends that *Williamson County* expresses a *prudential* ripeness requirement, not an Article III requirement, and that compelling reasons support a different prudential rule in a case such as this one.[4]

---

[4] Mr. Peters also claims that a cause of action under 42 U.S.C. § 1983 does not require "exhaustion" of state remedies, *see Patsy*

(continued...)

More specifically, Mr. Peters contends that the Village's sanitary drainage system and the occupation and use of his property for that system are illegal and unauthorized. In his view, the Village has no ownership rights over the property or over the ditch and tile on his property. Nor has the Village, as a municipal entity without home rule authority, any

---

[4] (...continued)
v. Board of Regents, 457 U.S. 496, 516, 102 S. Ct. 2557, 73 L. Ed.2d 172 (1982), and, at oral argument, he stated that there is no "exception" to this general rule applicable to takings claims. In this respect, he misunderstands the use of the term "exhaustion" in the context of *Williamson County*. As we stated in *Daniels v. Area Plan Commission*, 306 F.3d 445 (7th Cir. 2002),

> the additional ripeness requirements of *Williamson County* create a takings claim exception to *Patsy*'s general requirement that exhaustion is not required in § 1983 suits. Therefore litigants, like the [plaintiffs] in this case, who assert a takings claim under 42 U.S.C. § 1983 may not rely solely on *Patsy*, but must meet the Court imposed ripeness requirements of Williamson County prior to bringing a federal claim.

Id. at 453; *see also Williamson County Reg. Planning Comm'n v. Hamilton Bank of Johnson County*, 473 U.S. 172, 194-95 & n. 13, 105 S. Ct. 3108, 87 L. Ed.2d 126 (1985) (noting that "exhaustion" is not required, but that "no constitutional violation occurs until just compensation has been denied," and, therefore, resort to state procedures is necessary). Our cases have used "exhaustion" as a shorthand for the requirement of resort to available state process identified in *Williamson County*. *See Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 957 (7th Cir. 2004); *Daniels*, 306 F.3d at 453; *Forseth v. Vill. of Sussex*, 199 F.3d 363, 372 (7th Cir. 2000). We continue to do so here, although we acknowledge the conceptual distinction between our usual use of the term, *see Patsy*, 457 U.S. 496, 102 S. Ct. 2557, 73 L. Ed.2d 172, and the notion that an injured property owner's takings claim is not ripe until just compensation is denied, *see Williamson County*, 473 U.S. at 194-95.

power of eminent domain over that property. Consequently, he argues, he is entitled to injunctive relief to end the occupation of the property by the Village. He relies on our decision in *Daniels v. Area Plan Commission*, 306 F.3d 445 (7th Cir. 2002).

Mr. Peters then submits that there is another, and related, reason why he should not be required to observe the exhaustion requirement of *Williamson County*. He notes that *Williamson County* requires the exhaustion of state remedies only when the state procedures are available and adequate. *Williamson County*, 473 U.S. at 194, 197. When no such procedure is available in state court, the requirement is inapplicable, and a litigant may resort to a takings claim in federal court without any antecedent litigation in the state forum. He contends that, because of its non-home rule status, the Village is exempt from an inverse condemnation remedy and, therefore, the only possible state remedies available to him are speculative and theoretical. *Williamson County*, he reminds us, imposes on him no obligation to expend time and resources exploring such gossamer paths. The state avenue of relief, he further reminds us, must be "reasonable" and "certain" at the time of the taking. *Id.* at 194 (quoting *Regional Rail Reorganizational Act Cases*, 419 U.S. 102, 124-25, 95 S. Ct. 335, 42 L. Ed. 2d 320 (1974)).

Mr. Peters elaborates further that there is no specific statutory remedy for inverse condemnation in Illinois and that, therefore, a landowner who has been denied the use of his property by the government, without an eminent domain action having been brought, must bring a mandamus action against that

governmental entity to compel it to institute eminent domain proceedings. For such a mandamus action to succeed, however, the defendant governmental entity must have the authority to carry out the task that the plaintiff claims it has a clear legal duty to perform. Here, he continues, the Village, by virtue of its status as a non-home rule municipality, has no authority to bring the eminent domain proceeding which Mr. Peters believes should have been brought. Moreover, he continues, with one exception not relevant here, the Village's powers are limited to its own territory, and Mr. Peters' land is not within the boundaries of the Village. Consequently, from Mr. Peters' perspective, inverse condemnation procedures are unavailable and inadequate and he may proceed in federal court to seek injunctive and compensatory relief.

The Takings Clause of the Fifth Amendment provides that no "private property [shall] be taken for public use, without just compensation." U.S. Const. amend. V. "*While it confirms the State's authority to confiscate private property*, the text of the Fifth Amendment imposes two conditions on the exercise of such authority: the taking must be for a 'public use' and 'just compensation' must be paid to the owner." *Brown v. Legal Found. of Washington*, 538 U.S. 216, 231-32, 123 S. Ct. 1406, 155 L. Ed.2d 376 (2003) (emphasis added).

"The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County*, 473 U.S. at 194. This principle makes clear that, ordinarily, compensation, not an injunction, is the appropriate remedy for a taking that satisfies the public use

requirement. *Patel v. City of Chicago*, 383 F.3d 569, 574 (7th Cir. 2004). "[T]he federal courts' role is not to enjoin localities from exercising their eminent domain powers, but to ensure that property owners are justly compensated when localities exercise that power." *Id.* at 574.[5]

Because "[n]o constitutional violation occurs until just compensation has been denied," *Williamson County*, 473 U.S. at 195 n.13, the Supreme Court has crafted a special ripeness doctrine that applies to claims arising under the Takings Clause. In *Williamson County*, the Supreme Court considered a claim for a temporary regulatory taking, occasioned by zoning regulations covering a particular plot of land. The Court affirmed the dismissal of the action by the landowner, holding it premature on two separate bases. First, the Court ruled that the landowner had failed to obtain a final decision from the state agency responsible for the taking. *Williamson County*, 473 U.S. at 190-94 (explaining the final decision requirement). Second, the Court reiterated the principle that the Constitution does not prevent "taking[s]," but rather prohibits "taking[s] without just compensation." *Id.* at 194. A state need not provide compensation prior to, or contemporaneous with, the alleged taking, so long as there is a "reasonable, certain and adequate provision" at the time of the taking for an injured property owner to obtain just compensation from the state after the taking has been

---

[5] *See also McKenzie v. City of Chicago*, 118 F.3d 552, 556 (7th Cir. 1997) ("States condemn and pay for land all the time; the Takings Clause of the fifth amendment supposes that money damages are a constitutionally adequate substitute for real property.").

accomplished. *Id.* at 194 (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. at 124-25); *see also id.* at 196. Therefore, a plaintiff property owner cannot claim a violation of the Just Compensation Clause until he has sought and been denied compensation under available state court procedures. *Id.* at 194 n.13, 195.

We have described the alternate bases for dismissing the claim in *Williamson County* as a two-pronged ripeness requirement for takings claims: (1) a final decision by the government entity responsible for the taking and (2) exhaustion of state procedures. *Forseth v. Vill. of Sussex*, 199 F.3d 363, 372 (7th Cir. 2000). Since *Williamson County*, we also have recognized that allegations of *physical* takings are subject to a streamlined ripeness analysis; the taking itself constitutes a final action, and therefore a court need only assess whether the plaintiff had availed himself of appropriate state procedures. *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 958 (7th Cir. 2004).

Williamson County created a "limited exception to its exhaustion requirement based on the futility of seeking state court relief." *Daniels*, 306 F.3d at 456. If a property owner demonstrates that state procedures for obtaining just compensation are either unavailable or inadequate, the claim is immediately ripe in federal court. *See Williamson County*, 473 U.S. at 196-97; *Daniels*, 306 F.3d at 456, 457-58.

Despite the strong presumption that damages, not injunctive relief, is the appropriate remedy in a Takings Clause action, our case law does acknowledge

that there are limited circumstances in which injunctive relief is available. For instance, it is well accepted that, when the government has taken property for a private, rather than a public, use, injunctive or declaratory relief may be appropriate. *See Daniels*, 306 F.3d at 457 n.11. Similarly, the Supreme Court has held that many facial challenges to legislative action authorizing a taking can be litigated immediately in federal court. *See San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 345, 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005); *Yee v. City of Escondido*, 503 U.S. 519, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992); *see also Holliday Amusement Co. of Charleston v. South Carolina*, 493 F.3d 404, 2007 WL 1893384, at *2 (4th Cir. July 3, 2007) ("[T]he state procedures requirement does not apply to facial challenges to the validity of a state regulation.").

With these principles in mind, we now turn to Mr. Peters' specific contentions. Mr. Peters submits that this futility exception applies in this case. In his view, exhaustion would be futile here because an inverse condemnation remedy is not available to him under Illinois law. He relies on Illinois precedent that states that the usual remedy in Illinois "inverse condemnation" situations is a mandamus action seeking to compel the responsible agency to institute condemnation proceedings, *see, e.g.*, *Luperini v. County of DuPage*, 265 Ill. App. 3d 84, 202 Ill. Dec. 528, 637 N.E.2d 1264, 1268 (Ill. App. Ct. 1994); if the agency (or local government) has no authority to institute eminent domain proceedings, Mr. Peters contends, a mandamus action against it will fail, and the state will provide no remedy.

Mr. Peters has not met his burden of demonstrating that it would be futile to pursue available remedies in state court. In Illinois, inverse condemnation is a judicially recognized remedy arising out of the self-executing takings provision of the Illinois Constitution. Illinois Const. art. 1, § 15; *see also Warner/Elektra/Atlantic Corp. v. County of DuPage*, 991 F.2d 1280, 1284-85 (7th Cir. 1993) (explaining the availability of a judicially-created inverse condemnation action under the Illinois Constitution); *Roe v. Cook County*, 358 Ill. 568, 193 N.E. 472, 474 (Ill. 1934) (interpreting the Takings Clause of the Illinois Constitution as self-executing). Specifically, in *Roe v. Cook County*, 358 Ill. 568, 193 N.E. 472 (Ill. 1934), the Supreme Court of Illinois has stated that:

> [w]hen the Constitution forbids the taking or damaging of private property without just compensation and points out no remedy, and no statute affords one, for the invasion of the right of property thus secured, the common law, which affords a remedy for every wrong, will furnish the appropriate action for the redress of such grievance.
>
> . . . .
>
> It is entirely beside the point to say that even though our bill of rights assures every person that his property will not be taken for public use without just compensation, yet where a county or other public body violates this section by taking private property without condemnation proceedings, one may not

> recover simply because the Legislature has failed to provide any specific remedy. If this were true, the constitutional guaranty would be nugatory and private property could be taken with impunity and without redress to the injured property owner. The constitutional provision itself, without remedial legislation, is basic law, which not only confers a right but *presupposes a remedy*.

Id. at 473-74 (emphasis added). Under *Roe*'s interpretation of the Illinois Constitution, the common law of Illinois will afford Mr. Peters a remedy. Indeed, Mr. Peters does not contend that *Roe* is no longer the law of Illinois; nor has he identified a single case in which compensation was refused on the basis that he asserts would doom his efforts to obtain relief in Illinois courts.[6] Rather, Mr. Peters claims that, despite

---

[6] Some of our sister circuits also have taken the view that a selfexecuting provision of a state's constitution may constitute a sufficiently reasonable, certain and adequate remedy to satisfy the Fifth Amendment and, under *Williamson County*, is likewise sufficient to require the plaintiff to proceed in state court before raising a federal takings claim. *See Bateman v. City of West Bountiful*, 89 F.3d 704, 708-09 (10th Cir. 1996) ("A property owner's cause of action for inverse condemnation is provided by Article I, section 22 of the Utah Constitution. This constitutional provision is self-executing. [The plaintiff]'s failure to avail himself of the procedure renders his claim premature."); *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 380 (2d Cir. 1995) (holding that when a state's constitution provides a "straightforward takings clause," even when no case provides compensation for the precise kind of taking alleged by the plaintiff, the plaintiff "is still required to look to the state for compensation before its takings claim will lie"). *But see Asociación de Subscripción Conjunta del Seguro de Responsibilidad Obligatorio v. Flores Galarza*, 484 F.3d

(continued...)

the clear language in *Roe*, Illinois will not provide a remedy. He bases this assertion on his reading of Illinois precedent establishing the manner in which claims under § 15 ordinarily proceed, that is, by way of a mandamus action to force the municipality to institute eminent domain proceedings, *see, e.g.*, *Luperini*, 202 Ill. Dec. 528, 637 N.E.2d at 1268. Whatever subsequent Illinois cases say about the usual method a landowner might use to obtain compensation, Roe indicates that the courts of the state will find a remedy if a taking has occurred. Based on this clear statement by the Supreme Court of Illinois that a remedy is available to injured landowners, we conclude that Mr. Peters "has not shown that the inverse condemnation procedure is unavailable or inadequate, and until [he] has utilized that procedure, [his] taking claim is premature." *Williamson County*, 473 U.S. at 197.[7]

---

[6] (...continued)
1 (1st Cir. 2007) ("In our view, [reasonable, certain and adequate procedures] do not include litigation of a state takings claim or any general remedial cause of action under state law. Rather, the Supreme Court must have had in mind only those procedures specifically designed by the state to avoid constitutional injury in the first instance by providing a means for a plaintiff to obtain compensation for the government's taking of property.").

[7] As we noted in *Rockstead v. City of Crystal Lake*, 486 F.3d 963 (7th Cir. 2007), when "the obstacle to [just compensation] is a state common law doctrine," a plaintiff may face greater difficulty in demonstrating that state procedures will fail him. *Id.* at 966. "Judges do not make statutes or constitutions and cannot change them, but they do make, and they can-and do-change, common law doctrines." *Id.*

Finally, Mr. Peters contends that Williamson County's requirements are prudential and insufficient to support the district court's decision that it lacked subject matter jurisdiction in this case. He relies largely on Chief Justice Rehnquist's concurring opinion in *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 348-52, 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005), which, Mr. Peters contends, "exposed" *Williamson County*'s "fundamental and untenable doctrinal flaws." Appellant's Br. at 10 n.2.

Williamson County's ripeness requirements are prudential in nature. *See Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733-34 & n.7, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (1997); *Forseth*, 199 F.3d at 368 n.7. The prudential character of the *Williamson County* requirements do not, however, give the lower federal courts license to disregard them. The Supreme Court has determined, as a matter of law, when federal takings claims are ripe and has set forth a rule in *Williamson County* that this court is bound to follow. In the absence of compliance with *Williamson County*, the district court correctly dismissed this action.

Conclusion

We affirm the judgment of the district court.

Affirmed

Appendix B-1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

BRUCE PETERS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No.
	)	05-2242
THE VILLAGE OF CLIFTON,	)	
an Illinois municipal	)	Filed:
corporation; ALEXANDER, COX,	)	April 18, 2006
& MCTAGGERT, INC.; and	)	
JOSEPH MCTAGGERT,	)	
	)	
Defendants.	)	

OPINION

On March 28, 2006, the Magistrate Judge filed a Report and Recommendation (#22) in the above cause. The Magistrate Judge recommended that the Defendant Village of Clifton's Motion to Dismiss (#15) be GRANTED and this case be dismissed without prejudice.

On April 6, 2006, Plaintiff filed his Objection to the Report and Recommendation (#24). This court has reviewed the Magistrate Judge's reasoning and the Plaintiff's Objection. After a thorough and careful de novo review, this court agrees with and accepts the Report and Recommendation of the Magistrate Judge.

IT IS THEREFORE ORDERED:

(1) Defendant Village of Clifton's Motion to Dismiss (#15) is GRANTED.

(2) This case is dismissed without prejudice to allow Plaintiff to pursue his claims in state court.

ENTERED this 18th day of April, 2006

s/ Michael P. McCuskey
MICHAEL P. McCUSKEY
CHIEF U.S. DISTRICT JUDGE

Appendix C-1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
Urbana Division

BRUCE PETERS, Plaintiff,	)	
v.	)	
	)	
THE VILLAGE OF CLIFTON, an Illinois municipal corporation; ALEXANDER, COX & MCTAGGERT, INC.; and JOSEPH MCTAGGERT; Defendants.	)	Case No. 05-2242
	)	Filed: March 28, 2006

REPORT AND RECOMMENDATION

In October 2005, Plaintiff, Bruce Peters, filed a Complaint (#1) against Defendants the Village of Clifton, Alexander, Cox & McTaggert, Inc., and Joseph McTaggert, alleging violations of the Fifth and Fourteenth Amendments of the United States Constitution, pursuant to 42 U.S.C. § 1983. Federal jurisdiction is based on federal question under 28 U.S.C. § 1331.

In January 2006, Defendant Village of Clifton (hereinafter "Village") filed a Motion To Dismiss (#15). After reviewing the parties' pleadings and memoranda, this Court recommends, pursuant to its authority under 28 U.S.C. § 636(b)(1)(B), that Defendant's Motion To dismiss **(#15)** be **GRANTED**.

Appendix C-2

I. Background

The following background is taken from the complaint. Plaintiff owns sixty-seven acres of land in Iroquois County which is used to grow crops. (#1, ¶7 and Ex. A.) Plaintiff's property is part of Subdistrict No. 14 of Union Drainage District No. 2 of Danforth and Ashkum. (#1, ¶ 12.) At some point in the past, unknown persons installed farm drainage tile that traverses Plaintiff's property underground beginning at the Village limits on the west side of Interstate 57. (#1, ¶13.) A nature preserve borders the drainage ditch above the farm drainage tile. (#1, ¶18.) From the time Plaintiff bought the property in 1991 to the present, no recorded easement grants any person or entity any rights to use the title. (#1, ¶15.)

Defendant Alexander, Cox & McTaggert (hereinafter "ACM"), a corporation doing business in Clifton, Illinois, owns approximately sixty-two acres of land immediately west of the Clifton exit off Interstate 57.

For "quite some time," the Village has asserted ownership over the drainage tile at issue. At some point in the past, the Village converted Plaintiff's drainage tile and connected it to the Village's sanitary sewer tile. Since then, the Village has been using Plaintiff's drainage tile as part of its unregulated unlicensed sanitary sewer system and discharging sewage through the drainage tile within Plaintiff's property. (#1, ¶14.)

In the spring of 2005, Defendants McTaggert, on behalf of ACM, and the village trespassed on Plaintiff's

property and used various poisons on the nature preserve that borders the drainage ditch over the illegal sanitary sewer line, resulting in the destruction of thousands of dollars worth of trees and destabilization of the drainage soil banks. (#1, ¶18.) Defendants Village, McTaggert, and ACM excavated and installed a new underground tile and connected it with the existing illegal Village sanitary sewer tile at or about the property line between Plaintiff's property and the property immediately west of Plaintiff's property. (#1, ¶19.) In the process, they expanded the size, scope, and purpose of the drainage tile, and destroyed an unknown number of acres of Plaintiff's property immediately contiguous to Plaintiff's drainage ditch, rendering the soil unusable for growing agricultural crops. In addition, by connecting the illegal sanitary sewer to the illegal tile, Defendants are draining untreated sewage and waste through Plaintiff's property, contaminating Plaintiff's property and exposing the property and persons on the property to hazardous and infectious waste. (#1, ¶19.)

Pursuant to 70 ILCS 605/1, the commissioners of Union Drainage District No. 2 and Subdistrict No. 14 have jurisdiction and authority over the drainage of waters within aboveground ditches and underground tiles. (#1, ¶20.) These commissioners did not grant Defendants permission to perform the acts described above. (#1, ¶21.)

Plaintiff also alleges that the Village is not a home rule village, so it has no eminent domain powers over Plaintiff's property, which is outside the Village.

Plaintiff's complaint alleges that Defendants violated his rights under the Fifth and Fourteenth Amendments.

II. Standard of Review

The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to decide the merits of the case. *Gibson v. City of Chi.*, 910 F.2d 1510, 1520 (7th Cir. 1990). In reviewing a motion to dismiss under Rule 12(b)(6), the Court must accept as true all well-pleaded factual allegations and draw all inferences in the light most favorable to the nonmoving party. *Id.* at 1521. The Court should dismiss the case only if the nonmoving party can prove no set of facts consistent with the allegations of the complaint that would entitle him to relief. *Bennett v. Schmidt*, 153 F.3d 516, 518-19 (7th Cir. 1998).

III. Analysis

Defendant argues that the Court should dismiss this case because it is not ripe for review and because Plaintiff has failed to allege municipal involvement by way of a policy, custom, or practice.

Ripeness is an issue of subject matter jurisdiction, therefore the Court will address Defendant's ripeness argument first. If the case is not ripe for purposes of Article III, we must dismiss the case for lack of subject matter jurisdiction. *Forseth v. Vill. of Sussex*, 199 F.3d 363, 368 (7th Cir. 2000) (stating that the court has subject matter jurisdiction over only those cases that are ripe for adjudication).

Appendix C-5

A takings claims under the United States Constitution does not become ripe until the plaintiff has exhausted state remedies. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985). In *Williamson County*, the Supreme Court articulated certain ripeness requirements that a plaintiff must satisfy before a federal court may adjudicate a claim based on constitutional property rights: (1) the plaintiff must demonstrate that he received a final decision from the relevant government entity; and (2) the plaintiff must have sought compensation through procedures that the state has provided. *Forseth*, 199 F.3d at 372.

Defendant argues that Plaintiff has failed to satisfy either requirement. Defendant provided no information in his brief regarding what state remedies Plaintiff has available to him. However, at the March 3, 2006, hearing, Defendant stated that Plaintiff could bring an inverse condemnation suit. Inverse condemnation describes the manner in which a landowner recovers just compensation for a taking of property when formal condemnation proceedings have not been instituted. *Westwood Forum, Inc. v. City of Springfield*, 634 N.E.2d 1154, 1162 (Ill. App. Ct. 1994) (regulatory takings case).

A taking involving a physical invasion is subject to a streamlined ripeness analysis because the physical invasion itself constitutes a final decision. *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 958 (7th Cir. 2004). Here, Plaintiff has alleged that Defendants trespassed onto his property, among other things. Thus, Plaintiff has satisfied the first requirement.

Regarding the second requirement, however, Plaintiff acknowledges that he has not pursued any state remedies. Instead, he contends he has no adequate state court remedy. *See Daniels v. Area Plan Comm'n of Allen County*, 306 F.3d 445, 456 (7th Cir. 2002) (stating that the Supreme Court in *Williamson County* "adopted a limited exception to its exhaustion requirement based on the futility of seeking state court relief"). He states that he addressed the issue of ripeness in his complaint, in which he alleges as follows:

> 22. Because the Plaintiff's property is not within the Village of Clifton, Illinois and because the Village of Clifton is not a Home Rule Village it has no Eminent Domain powers.
>
> . . . .
>
> 27. With regards to the continuing illegal drainage of sewage through and under Plaintiff's property Plaintiff has no adequate remedy at law.

(#1, ¶¶22, 27.) Based on his allegations of futility, he contends that he has satisfied the *Williamson County* requirements.

Specifically, Plaintiff appears to contend that his ability to litigate his claim by filing an inverse condemnation is limited as a practical matter because "a State Court 'inverse condemnation action' against the Village requir[es] that the governmental authority initiate a condemnation action." (Plaintiff's

Memorandum in Opposition, #19, p.1.) Thus, if the Village has no authority to file a condemnation petition, an inverse condemnation suit would quickly hit a roadblock and, as a result, it would be futile for him to file an inverse condemnation claim in state court. Defendant did not dispute this.

It is undisputed that the Village of Clifton is a nonhome-rule municipality. Nonhome-rule municipalities are governed by "Dillon's Rule." *T & S Signs, Inc. v. Vill. of Wadsworth*, 634 N.E.2d 306, 310 (Ill. App. Ct. 1994). Under Dillon's Rule, a nonhome-rule unit may exercise only those powers specifically granted to it by the Illinois Constitution or by statute. *Id.* Article VII, Section 7, of the Illinois Constitution enumerates the powers the legislature has delegated to a nonhome-rule unit, and eminent domain authority is not one of those powers. (Ill. Const., Art. VII, § 7.) Based on information gleaned from the motion hearing, this is apparently the basis for Plaintiff's argument that the Village has no eminent domain power under the circumstances alleged in this case.

However, Illinois statutes provide eminent domain power in a multitude of ways and the lack of an express listing among the powers delegated to a nonhome-rule unit does not entirely dispose of this question. *See e.g., Vill. of Cary v. Trout Valley Ass'n*, 667 N.E.2d 1082, 1084-88 (Ill. App. Ct. 1996). Nevertheless, Defendant did not challenge Plaintiff's statement that the Village lacks eminent domain power in this case, so the Court will assume it is true for purposes of the following discussion.

Assuming *arguendo* that the Village has no eminent domain power to perform the acts alleged, the Court must next consider Plaintiff's contention that he has no state remedies.

Neither party has presented authority or discussion regarding whether the lack of eminent domain power prevents a party from bringing an inverse condemnation claim. The Court has found no Seventh Circuit or Illinois case law that directly addresses this issue. Other courts have addressed the issue and reached conflicting conclusions. *See generally Daniels*, 306 F.3d at 456 (stating that, in Indiana, an inverse condemnation action is one "against an entity with the power to condemn (usually a governmental defendant)"); *City of Ashland v. Hoffarth*, 733 P.2d 925, 928 (Or. Ct. App. 1987) (stating that one of the elements of an inverse condemnation claim is that the taking be by an agency or subdivision of the state "having the power of eminent domain"); *Vicory v. Walton*, 730 F.2d 466, 467 (6th Cir. (Ohio) 1984) (stating that "Plaintiff may not maintain a constitutional cause of action against these defendants who neither have nor claim the eminent domain power, nor any power similar to it"); *Jacobson v. Tahoe Reg'l Planing Agency*, 566 F.2d 1353, 1358 (9th Cir. 1977) (stating that a "cause of action for inverse condemnation under the just compensation clause cannot be stated against the TRPA, its executive director or members of its governing board because they lack condemnation authority"), *rev'd on other grounds, Lake Country Estates, Inc. v. Tahoe Reg'l; Planning Agency*, 440 U.S. 391 (1979). *See also Katz v. Connecticut*, 307 F. Supp. 480, 482 (D. Conn. 1969), *aff'd*, 433 F.2d 878 (2d Cir. 1970) (stating that if state

authorities take private property for public use without just compensation, even if they are acting outside their official power, they are subject to an inverse condemnation suit); *Baker v. Burbank-Glendale-Pasadena Airport Auth.*, 705 P.2d 866, 868-69 (Cal. Ct. App, 1985), *cert. denied*, 475 U.S. 1017 (stating that an inverse condemnation action may be based on the state constitution); *T.J. Fountain v. Metro. Atlanta Rapid Transit Auth.*, 678 F.2d 1038, 1043-45 (11th Cir. 1982) (stating that the concept of an unconstitutional taking does not turn on which public agency deprived a private party of the use of his property, but rather on the fact that the deprivation occurred for public use; as a result, the party deprived of his property may challenge the uncompensated deprivation by bringing an inverse condemnation action).

To conclude that Plaintiff cannot seek just compensation in state court based on an inverse condemnation claim because the government entity taking the property lacks eminent domain authority seems to elevate form over function. The United States Supreme Court has said that "[t]he phrase 'inverse condemnation' appears to be one that was coined simply as a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." *United States v. Clarke*, 445 U.S. 253, 257 (1980). The Supreme Court went on to state as follows:

> As defined by one land use planning expert, "[i]nverse condemnation is '*a cause of action against a governmental defendant* to recover the value of property which has been taken in

> fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.'" D. Hagman, Urban Planning and Land Development Control Law 328 (1971) (emphasis added). A landowner is entitled to bring such an action as a result of the "self-executing character of the constitutional provision with respect to compensation . . . ."

United States v. Clarke, 445 U.S. at 257.

Inverse condemnation actions rest on the constitutional requirement that the government must provide just compensation to a property owner when it takes his private property for a public use. U.S. Const., 5th Amend.; Ill. Const., Art. I, § 15. Article I, Section 15, of the Illinois Constitution provides as follows: "Private property shall not be taken or damaged for public use without just compensation as provided by law. Such compensation shall be determined by a jury as provided by law." Ill. Const., Art. I, § 15. Thus, the Illinois Constitution establishes an individual's right to seek just compensation for a taking of private property for public use. It is well-settled that this section is self-executing. *Roe v. County of Cook*, 193 N.E. 472, 473 (Ill. 1934) (stating that "[t]he constitutional provision itself, without remedial legislation, is basic law, which not only confers a right but presupposes a remedy. Standing alone, section 13, (now Ill. Const. 1970, Art. I, § 15), is self-executing."); *Hoekstra v. Kankakee County*, 365 N.E.2d 553, 555 (Ill. App. Ct. 1977).

The constitutional language does not refer to inverse condemnation. As noted above, that phrase applies to the manner in which a landowner may recover just compensation for a taking when condemnation proceedings have not been instituted. *Clark*, 445 U.S. at 257. The phrase "inverse condemnation" is not definitive or talismanic; if other remedies are available, a plaintiff must seek them. Thus, even assuming that Plaintiff is correct that he cannot bring an inverse condemnation claim in this case, the Court does not believe that Section 15 limits the remedy for a taking to a claim for inverse condemnation. To accept Plaintiff's reasoning would effectively restrict an entire subset of citizens—those whose property has been taken by the acts of nonhome-rule municipalities—from exercising their rights under the Illinois Constitution. We do not believe that the constitutional right provided by Section 15 is so limited.

Absent precedential authority that supports Plaintiff's argument, the Court concludes that a municipality's lack of authority to initiate eminent domain proceedings cannot deprive a citizen of his constitutional right to just compensation when that municipality has taken private property for public use. Accordingly, Plaintiff must look to state remedies for compensation for the alleged taking, whether that remedy is titled an "inverse condemnation" claim or something else, such as a suit for damages or trespass, before he can pursue his takings claim in federal court. *See Muscarello v. Vill. of Hampshire*, 644 F. Supp. 1016, 1019 (N.D. Ill. 1996) (in a case where the plaintiff sued a nonhome-rule municipality for a taking, stating that Illinois has adequate procedures

for obtaining just compensation); *see also Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 380 (2d Cir. 1995) (holding that the Connecticut state constitution may be used as the basis for an inverse condemnation action and requiring the plaintiff to exhaust state remedies before bringing a federal takings claim); *Game and Fish Comm'n v. Farmers Irr. Co.*, 426 P.2d 562, 565-66 (Colo. 1967) (allowing landowners who suffered a taking to bring a suit for damages based on the Colorado constitution even though the government entity had no eminent domain power).

Because Plaintiff has not exhausted his state remedies, the claims in this case are not ripe and the Court lacks a subject matter jurisdiction. *See Greenfield Mills*, 361 F.3d at 957 (stating that the court has subject matter jurisdiction over only those takings claims for which the *Williamson County* requirements are satisfied or otherwise excused); *Muscarello*, 644 F. Supp. at 1018 (applying the ripeness requirement to this nonhome-rule municipality). Accordingly, the Court recommends dismissing the case.

In addition, to the extent that Plaintiff is asserting a due process claim, the exhaustion requirement applies to that claim, too. *Hager v. City of West Peoria*, 84 F.3d 865, 869 (7th Cir. 1996) (stating that "[t]he exhaustion requirement of *Williamson County* applies whether plaintiffs claim an uncompensated taking, inverse condemnation, or due process violation").

IV. Summary

For the reasons stated above, this Court recommends that Defendant's Motion To Dismiss **(#15)** be **GRANTED** and all claims dismissed without prejudice to Plaintiff bringing his claims in state court. The parties are advised that any objection to this recommendation must be filed in writing with the clerk within ten (10) working days after being served with a copy of this Report and Recommendation. *See* 28 U.S.C. § 636(b)(1). Failure to object with constitute a waiver of objections on appeal. *Video Views, Inc. v. Studio 21, Ltd.*, 797 F.2d 538, 539 (7th Cir. 1986).

ENTER this 28th day of March, 2006.

s/ DAVID G. BERNTHAL
U.S. MAGISTRATE JUDGE

83

7

No. 07-635

FILED
JAN 31 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

BRUCE PETERS,

Petitioner

v.

VILLAGE OF CLIFTON, an Illinois municipal corporation; ALEXANDER, COX & McTAGGERT, INC.; and JOSEPH McTAGGERT,

Respondents

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Seventh Circuit

Brief For Respondent In Opposition To Petition

James C. Kearns
Heyl, Royster, Voelker & Allen
102 E. Main Street, Suite 300
Urbana, IL 61801
(217) 344-0060
Counsel for Respondents

QUESTIONS PRESENTED

1. Whether a Fifth Amendment takings analysis applies to Petitioner when he has alleged *ultra vires*, unlawful and illegal acts by Respondent and when the Fifth Amendment applies only to authorized governmental acts.

2. If a Fifth Amendment takings analysis applies, whether Petitioner has presented compelling reasons to grant the Petition, where the Seventh Circuit's Opinion affirming the District Court's analysis under *Williamson County* does not conflict with the decisions of this Court or a Court of Appeals, and where Petitioner does not claim the Seventh Circuit's ruling implicates an important federal question that has not been settled by this Court.

CORPORATE DISCLOSURE STATEMENT

Alexander, Cox & McTaggert, Inc., has no parent company and no publicly held company owns 10% or more of that party's stock.

TABLE OF CONTENTS

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

INTRODUCTION 1

SUPPLEMENT TO PETITIONER'S STATEMENT OF THE CASE 2

I. Background 2

REASONS FOR DENYING THE PETITION 3

I. This case is not a proper vehicle for considering whether *Williamson County* should be overruled because Petitioner contends the government's conduct was unauthorized, illegal, and *ultra vires* and such alleged conduct does not give rise to a Fifth Amendment takings claim. 3

II. Petitioner's Petition should not be granted because the Court's decision in *Williamson County* was correct 5

TABLE OF CONTENTS - Continued

A. The *Williamson County* decision re-affirmed more than 100 years of takings jurisprudence 5

B. The State Compensation Requirement Does Not Create A Contradictory And Unpredictable Jurisdictional Framework 13

C. The State Compensation Requirement Does Not Conflict With Removal Jurisdiction 16

D. Acceptance of Petitioner's theory would impose an unnecessary undue burden on States and their municipalities 18

III. *Williamson County* Applies to Allegations of Physical Takings 20

IV. The doctrine of *stare decisis* warrants denial of Petitioner's Petition for Writ of Certiorari . . . 23

CONCLUSION 24

TABLE OF AUTHORITIES

Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980) 13

Asociacion de Subscripcion Conjunta Del Seguro De Reponsabilidad Obligatorio v. Flores Galarza, 484 F.3d 1 (1st Cir. 2007) 20

Bay View, Inc. on behalf of AK Native Village Corps. v. Ahtna, Inc., 105 F.3d 1281 (9th Cir. 1997) 8

Belvedere Military Corp. v. County of Palm Beach, Florida, 845 F. Supp. 877 (S.D. Fla. 1994) 20

Carrollton Properties, Ltd. v. City of Carrollton, Texas, 2006 WL 2559535 (E.D. Tex. 2006) 16

Cherokee Nation v. Southern Kan. Ry. Co., 135 U.S. 641, 10 S.Ct. 965 (1890) . . . 5, 11, 18, 20, 23

Chicago, Milwaukee St. Paul and Pacific Railroad Co. v. United States, 799 F.2d 317 (7th Cir. 1986), cert. denied, 481 U.S. 1069 (1987) 4

City of Chicago v. International College of Surgeons, 522 U.S. 156, 118 S.Ct. 523, 139 L.Ed.2d 525 (1997) 17

Del Rio Drilling Programs Inc. v. United States, 146 F.3d 1358 (Fed. Cir. 1998) 4

Dickerson v. United States, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000) 23

Doney v. Pacific County, 2007 WL 1381515 (W.D. Wash. 2007) 16

Eastern Enterprises v. Apfel, 524 U.S. 498, 118 S. Ct. 2131, 141 L.Ed.2d 451 (1998) 3

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, 482 U.S. 304, 107 S. Ct. 2378 (1987) 3

Home Telephone & Telegraph Co. v. City of Los Angeles, 227 U.S. 278, 33 S.Ct. 312 (1913) 22

Hooe v. United States, 218 U.S. 322, 31 S.Ct. 85, 54 L.Ed. 1055 (1910) 4

Hudson v. Palmer, 468 U.S. 517, 104 S. Ct. 3194, 82 L.Ed.2d 393 (1984) 12

Hurley v. Kincaid, 285 U.S. 95, 52 S.Ct. 267, 76 L.Ed. 637 (1932) 11, 20

Intern'l College of Surgeons v. City of Chicago, 1995 WL 9243 (N.D. Ill. 1995), rev'd, 91 F.3d 981 (7th Cir. 1996), rev'd, 522 U.S. 157 (1997) 17

Joslin Mfg. Co. v. City of Providence, 262 U.S. 668, 43 S.Ct. 684 (1923) 6, 18, 23

Kaiser Aetna v. United States, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979) 22, 23

Laguna Gatuna, Inc. v. U.S., 50 Fed. Cl. 336 (Fed. Cl. 2001) 5

Langford v. United States, 101 U.S. 341, 11 Otto 341, 25 L.Ed.2d 1010 (1879) 4

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005) 3, 4

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) 12

Matsushita Electric Indus. Co. v. Epstein, 516 U.S. 367, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996) . . . 13

McKenzie v. City of White Hall, 112 F.3d 313 (8th Cir. 1997) 20

Moore v. Covinton County Comm'n, 2007 WL 1771384 (M.D. Ala. 2007) 16

Moore v. Sims, 442 U.S. 415, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979) 14

Nicholson v. United States, 77 Fed. Cl. 605 (Fed. Cl. 2007) 4

Palazzolo v. Rhode Island, 533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001) 12

Parratt v Taylor, 451 U.S. 527, 544, 101 S.Ct. 1908 (1908), overruled on other grounds, Daniels v. Williams, 474 U.S. 327 (1986) *14, 15*

Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) *23*

Preseault v. Interstate Commerce Commission, 494 U.S. 1, 110 S.Ct. 914, 108 L.Ed.2d 1 (1990) . 7, 8, 11

Raymond v. Chicago Union Traction Co., 207 U.S. 20, 28 S.Ct. 7, 52 L.Ed. 78 (1907) 21

Roedler v. U.S. Dep't of Energy, 1999 WL 1627346 (D. Minn. 1999) 4

San Remo Hotel, L. P. v. City and County of San Fancisco California, 545 U.S. 232, 125 S.Ct. 2491, 162 L.Ed.2d 315 (2005) .. 1, 2, 7, 9-11, 13, 15, 16, 19, 24

Schroder v. Bush, 263 F.3d 1169 (10th Cir. 2001) 8

Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976) 14

Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 117 S.Ct.1659, 137 L.Ed.2d 980 (1997) . 10

Sweet v. Rechel, 159 U.S. 380, 16 S.Ct. 43, 40 L.Ed. 188 (1895) 7, 23

United States v. General Motors, 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945) 22

United States v. International Business Machines Corp., 517 U.S. 843, 116 S.Ct.1793, 135 L.Ed.2d 124 (1996) 23

Villager Pond, Inc. v. Town of Darien, 56 F.3d 375 (2nd Cir. 1995), cert denied, 519 U.S. 808 (1966) 20

Western Union Telegraph Co. v. Pennsylvania Railroad Co., 195 U.S. 540, 25 S.Ct.133, 49 L.Ed. 312 (1904) 22

Williamson County Regional Planing Commission v. Hamilton Bank of Johnson County, 473 U.S. 172, 105 S. Ct. 3108, 87 L.Ed.2d 126 (1985) 1-3, 5, 7-13, 15-16, 18, 20-21, 23-24

Yearsley v. W.A. Ross Const. Co., 309 U.S. 18, 60 S.Ct. 413, 84 L.Ed. 554 (1940) 11, 20

OTHER

Thomas E. Roberts, Facial Takings Claims Under Agins-Nector: A Procedural Loose End, 24 U. Hawaii L. Rev. 623, 624 (2002) 9, 11

INTRODUCTION

Petitioner presents no compelling reason for his Petition for a Writ of Certiorari ("Petition") to be granted. *See* Sup. Ct. R. 10. Petitioner fails to demonstrate that the Seventh Circuit's August 22, 2007 Opinion is in conflict with a decision of this Court or another Court of Appeals or that the Seventh Circuit decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c). Petitioner has instead shown that the District Court's dismissal of his federal claim was in accordance with this Court's decisions in *Williamson County Reg'l Planning Commission v. Hamilton Bank of Johnson City* and *San Remo Hotel v. County of San Francisco*. Therefore, the Petition should be denied.

Petitioner claims the Court's decision in *Williamson County* should be reconsidered because it prevents him from bringing a Fifth Amendment takings claim in Federal Court and consequently eliminates his federal takings claim altogether.

Petitioner's arguments ignore over 100 years of takings jurisprudence wherein this Court has consistently held there is no Fifth Amendment takings claim when, at the time of the taking, there is a state provision which is "sufficiently reasonable, certain, and adequate to secure just compensation..."

Petitioner presents no compelling reasons for the grant of his Petition. His Petition addresses firmly established issues which do not merit this Court's attention. The Court's decision in *Williamson County* echoed firmly established takings jurisprudence and it was recently reaffirmed by this Court in *San Remo.* Because the Petitioner has failed to carry his substantial burden of demonstrating that there are any compelling reasons for the Court to grant his Petition, the Petition should be denied.

SUPPLEMENT TO PETITIONER'S STATEMENT OF THE CASE

I. Background

Petitioner contended in his Complaint, and before the Seventh Circuit Court of Appeals that "the Village's sanitary drainage system and the occupation and use of his property for that system are illegal and unauthorized."App. at A-7. Petitioner also contended in his Opening Brief before the Seventh Circuit Court of Appeals that the government's acts constituted "an *ultra vires* physical occupation of property..." and that there was an "illegal or *ultra vires* invasion of private property." Petitioner requested compensatory damages for the taking and a permanent injunction. App. at A-5.

REASONS FOR DENYING THE PETITION

I. This case is not a proper vehicle for considering whether *Williamson County* should be overruled because Petitioner contends the government's conduct was unauthorized, illegal, and *ultra vires* and such alleged conduct does not give rise to a Fifth Amendment takings claim.

A necessary prerequisite to a Fifth Amendment takings claim is *authorized* governmental action. The Fifth Amendment "does not bar government from interfering with property rights, but rather requires compensation 'in the event of *otherwise proper interference* amounting to a taking.'" *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543, 125 S. Ct. 2074, 2084, 161 L.Ed.2d 876 (2005) (*quoting First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304, 107 S. Ct. 2378, 96 L.Ed.2d 250 (1987) (emphasis added by Court in *Lingle*)). The Fifth Amendment "presupposes what the government intends to do is otherwise constitutional" and a takings analysis should be reserved for "cases where the governmental action is otherwise permissible." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 545-46, 118 S. Ct. 2131, 2157-58, 141 L.Ed.2d 451 (1998) (Kennedy, J., concurring in judgment and dissenting in part). "[A]t the heart of the Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing compensation for *legitimate government action* that takes 'private property' to serve the 'public' good." *Eastern Enterprises*, 524 U.S. at 554 (Stevens, J., dissent) (emphasis added). "The

constitutional prohibition against taking private property for public use without just compensation is directed against the government and not against individuals or public officers proceeding" without authority. *Hooe v. United States*, 218 U.S. 322, 335, 31 S.Ct. 85, 89, 54 L.Ed. 1055 (1910).

Consistent with the foregoing, the Court in *Lingle* held that a formula inquiring whether government regulation of private property "substantially advances" legitimate state interest is not an appropriate takings claim test because such test probes the regulation's underlying validity, and not whether just compensation has been provided for an otherwise proper taking. *Lingle*, 544 U.S. at 543. The Seventh Circuit Court of Appeals, in *Chicago, Milwaukee St. Paul and Pacific Railroad Co. v. United States*, 799 F.2d 317, 326 (7th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987), cited this Court's decision in *Langford v. United States*, 101 U.S. 341, 344-45, 11 Otto 341, 25 L.Ed.2d 1010 (1879) for the proposition that "*[a]uthorized acts* of the government may be takings...but unauthorized or mistaken ones are torts for which the officer alone is answerable." (emphasis added).

Lower federal courts are in agreement that alleged "unauthorized or tortious conduct [by the government] is not compensable under the Fifth Amendment." *Nicholson v. United States*, 77 Fed. Cl. 605, 614 (Fed. Cl. 2007). "[U]ltra vires conduct cannot give rise to a Fifth Amendment taking..." *Del Rio Drilling Programs Inc. v. United States*, 146 F.3d 1358, 1362 (Fed. Cir. 1998). *See also Roedler v. U.S. Dep't of Energy*, 1999 WL 1627346, p. 11 (D. Minn. 1999) (*ultra vires* acts "could not form the

basis of a taking claim"), *aff'd*, 255 F.3d 1347 (Fed. Cir. 2001), *cert. denied*, 534 U.S. 1056 (2001); *Laguna Gatuna, Inc. v. U.S.*, 50 Fed. Cl. 336, 341 (Fed. Cl. 2001) (recognizing only authorized government action can form basis of takings claim; unauthorized acts are viewed as torts, not takings).

Petitioner has alleged illegal, unauthorized, and *ultra vires* acts by the Defendants. Because the Fifth Amendment takings clause presupposes legitimate authorized governmental action, Petitioner has not pled a viable takings claim and the continuing viability of *Williamson County* has no bearing on Petitioner's claim.

II. Petitioner's Petition should not be granted because the Court's decision in *Williamson County* was correct.

A. The *Williamson County* decision re-affirmed more than 100 years of takings jurisprudence

Petitioner's argument that the Court's state compensation requirement set forth in *Williamson County Regional Planing Commission v. Hamilton Bank of Johnson County*, 473 U.S. 172, 105 S. Ct. 3108, 87 L.Ed.2d 126 (1985) has no plausible support cannot withstand scrutiny. The underlying basis for the *Williamson County* decision dates back to the late 1800s. In *Cherokee Nation v. Southern Kan. Ry. Co.*, 135 U.S. 641, 10 S. Ct. 965, 34 L.Ed. 295 (1890), the plaintiff contended congressional law violated the takings clause because the law did not provide for pre-takings

compensation. This argument was rejected, with the court stating:

> This objection to the act cannot be sustained. The constitution declares that private property shall not be taken 'for public use without just compensation.' It does not provide or require that compensation shall be actually paid in advance of the land to be taken; but the owner is entitled to *reasonable, certain and adequate provision* for obtaining compensation before his occupancy is disturbed.

135 U.S. at 659 (emphasis added). In determining the constitutional requirement had been met, the Court looked to the statutory provisions for obtaining compensation and found they were "sufficiently reasonable, certain, and adequate to secure just compensation..." *Id.*

In accord is the Court's decision in *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 43 S.Ct. 684, 67 L.Ed. 1167 (1923), wherein the plaintiffs argued a state law was an unconstitutional taking because it authorized the taking of property without an "offer to pay compensation therefor or a determination of it in advance." Rejecting the argument, this Court noted "it has long been settled that the taking of property for public use by a state or one of its municipalities need not be accompanied or preceded by payment, *but the requirement of just*

compensation is satisfied when the public faith and credit are pledged to a reasonably prompt ascertainment and payment, and there is adequate provision for enforcing the pledge." 262 U.S. at 677 (emphasis added). The Court determined, moreover, that the state law's provisions "adequately fulfill the requirement in respect of the ascertainment and payment of just compensation." *Id.* [1] *See also Sweet v. Rechel*, 159 U.S. 380, 16 S.Ct. 43, 40 L.Ed. 188 (1895); *Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 10, 110 S.Ct. 914, 921, 108 L.Ed.2d 1 (1990) (recognizing Fifth Amendment does not require that just compensation be paid in advance of or even contemporaneously with the taking).

The foregoing cases reflect more than 100 years of takings jurisprudence which was echoed in *Williamson County* and affirmed by the Court in *San Remo Hotel, L. P. v. City and County of San Fancisco California*, 545 U.S. 232, 125 S.Ct. 2491, 162 L.Ed.2d 315 (2005). In analogous cases involving takings claims against the federal government, this Court has applied a similar analysis, requiring takings plaintiffs to seek just compensation in the federal court of claims under the

---

[1] Petitioner suggests on page 15 of his brief that *Williamson County* is nonsensical because it requires the property owner "to ask the state for compensation before the property owner can sue the local government in federal court." *Williamson County* does not require a property owner to "ask the *state* for compensation," it instead provides that there can be no Fifth Amendment takings claim in federal district court when the property owner has an available compensatory remedy under state law.

Tucker Act before asserting a Fifth Amendment takings challenge in a federal district court. *Preseault*, 494 U.S. at 11-17 (holding takings claim in federal court of appeals was premature because the plaintiff failed to pursue an available remedy in the Court of Claims under the Tucker Act).[2] *See also Bay View, Inc. on behalf of AK Native Village Corps. v. Ahtna, Inc.*, 105 F.3d 1281, 1285 (9th Cir. 1997) (holding federal district court had no jurisdiction to address merits of takings claims where Congress provided a means for paying compensation for any taking that might have occurred); *Schroder v. Bush*, 263 F.3d 1169, 1177 (10th Cir. 2001) (takings claims

---

[2] On page 11 of the Brief Amici Curiae for Elizabeth Neumont, Amicus contend *Williamson County's* reliance on *Ruckelshaus v. Monsanto Co.* 467 U.S. 986 (1984) is misplaced because the *Ruckelshaus* plaintiff sought only equitable relief. The Court's decision in *Preseault*, however, parallels the *Williamson County* analysis, concluding a federal court of appeals could not consider a takings claim until the plaintiff avails itself of the process provided by the Tucker Act in the federal court of claims. *Preseault*, 494 U.S. at 11-12. Amici further suggests the Tucker Act line of cases are inapposite, stating "could such a suit be called a prerequisite to asserting a monetary claim against the government for compensation for a taking of property?" The question is not whether a property owner has to ripen his claim to obtain compensation under the Tucker Act; rather, the question is what action a property owner must take to assert a takings claim in federal district court against the federal government. Like state takings, property owners alleging federal takings are required to first assert their takings claim in the Federal Court of Claims under the Tucker Act before bringing a takings claim in a Federal District Court. *Preseault*, 494 U.S. at 17 ("petitioner's failure to make use of the available Tucker Act remedy renders their takings challenge [before the Second Circuit Court of Appeals] to the ICC's order premature").

against federal government in federal district court are premature until property owner has availed itself of process available under the Tucker Act), *cert. denied*, 534 U.S. 1083 (2002).

Decisions from this Court reflect that the determinative issue is not the *compensation owed* to the property owner at the time of the taking; but is instead the *adequacy and availability of the compensatory provisions* at the time of taking. If the state has provisions available for obtaining compensation, the property owner cannot assert a Fifth Amendment takings claim in federal district court.[3]

---

[3] In the Brief of Amicus Curiae Joyce Yamagiwa, several words are pulled form various cases and articles to purportedly describe the holding of *Williamson County*. *See* Yamagiwa Brief, pages 6-9. Without reviewing each of the cited authorities, it is impossible to know the context in which the purported words were used. In some cases, the words appear to be taken out of context. As but one example, Amicus cites one authority for the proposition that *Williamson County* was "ill-considered." *Id.* at page 6 (*citing* Thomas E. Roberts, Facial Takings Claims Under Agins-Nector: A Procedural Loose End, 24 U. Hawaii L. Rev. 623, 635 (2002)). That author, however, did not opine that *Williamson County* was ill-considered; he instead indicated the Court's use of the term "ripeness" may have been "ill-considered". 24 U. Hawaii L. Rev. at 635. The author further notes the state compensation rule is not a "ripeness rule", but is "better viewed as an element in the unique Fifth Amendment takings cause of action." *Id.* at 625-26. Amicus' citations, moreover, all pre-date the Court's decision in *San Remo*.

The basis for these decisions stems directly from the express terms of the Fifth Amendment:

> [B]ecause the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action.

Williamson County, 473 U.S. at 195, fn. 13 (emphasis in original). *See also Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 734, 117 S.Ct. 1659, 1665, 137 L.Ed.2d 980 (1997)(noting the state compensation requirement "stems from the Fifth Amendment's proviso that only takings without 'just compensation' infringe that Amendment").[4] In effect, "the state compensation

---

[4] In his concurring opinion in *San Remo*, Justice Rehnquist noted that the court in *Suitum* referred to the state compensation requirements as "merely a prudential requirement." 545 U.S. at 349. Although it is true the *Suitum* Court referred to the *Williamson County* requirements as "prudential," the Court went on to note that "[o]rdinarily a plaintiff *must* seek compensation through state inverse condemnation proceedings before initiating a takings suit in federal court unless the State does not provide adequate remedies for obtaining compensation." *Suitum*, 520 U.S. at 734, fn. 8 (emphasis added). Although the Court's discussion in *Suitim* is arguably *dicta* because the state compensation requirement was not at issue, the language re-affirms, rather than disproves, the constitutional basis for the state compensation requirement.

rule is an element of a Fifth Amendment takings claim." Thomas E. Roberts, Facial Takings Claims Under Agins-Nector: A Procedural Loose End, 24 U. Hawaii L. Rev. 623, 624 (2002).[5]

Petitioner reasons on pages 13-15 of his Brief that because a duty to pay just compensation accrues at the time of a taking, "the issue of whether the taking is 'without just compensation' should also be ascertained at that point." In making this argument, Petitioner ignores this Court's established holdings, both before and after *Williamson County*, that the Fifth Amendment does not require that just compensation be paid in advance of or even contemporaneously with the taking. *See, e.g., Preseault*, 494 U.S. at 10; *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18, 21, 60 S.Ct. 413, 415, 84 L.Ed. 554 (1940); *Hurley v. Kincaid*, 285 U.S. 95, 104, 52 S.Ct. 267, 269, 76 L.Ed. 637 (1932); *Cherokee Nation*, 135 U.S. at 649. Thus, while the compensation owed may be measured from the time of a physical intrusion, "as a matter of law, an *illegitimate* taking might not occur until

---

[5] In his *San Remo* concurrence, Justice Rehnquist questioned why takings claims should be relegated to state courts while land-use regulations challenged under the First Amendment or the Equal Protection clause can proceed directly to federal court. 545 U.S. at 350-51. The difference in treatment stems directly from the express language of the Constitution. Unlike the Fifth Amendment, the applicability of the First Amendment or the Equal Protection Clause is not dependent upon whether the violation is "without just compensation."

the government refuses to pay..." *First English*, 482 U.S. at 320, fn. 10, (emphasis added).

Whether there has been a taking without just compensation therefore depends on whether, *at the time of the taking*, the plaintiff has a remedy under state law which is sufficiently reasonable, certain, and adequate to secure just compensation and *not* whether compensation has been paid at the time the taking occurred. Because of the express "just compensation" prerequisite, the State's action is not "'complete' until the State fails to provide adequate compensation for the taking." *Williamson County*, 473 U.S. at 195; *Hudson v. Palmer*, 468 U.S. 517, 533, 104 S. Ct. 3194, 82 L.Ed.2d 393 (1984). *See also Hudson*, 468 U.S. at 539 (O'Connor, J., concurring) (plaintiff challenging a taking must either avail himself of the remedies guaranteed by state law or prove the available remedies are inadequate).[6]

---

[6] Brief Amici Curiae for Elizabeth J. Neumont suggest this Court failed to apply the state compensation requirements in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1003, 112 S.Ct.2886, 2887, 120 L.Ed.2d 798 (1992) and *Palazzolo v. Rhode Island*, 533 U.S. 606, 606, 121 S.Ct. 2448, 2451, 150 L.Ed.2d 592 (2001). In both of those cases, the Court's recitation of the factual background established the state compensation requirement had been met because, in each case, the property owner had sued for a Fifth Amendment taking in state court.

B. The State Compensation Requirement Does Not Create A Contradictory And Unpredictable Jurisdictional Framework

Petitioner contends the state compensation requirement necessarily means that Fifth Amendment takings claimants will never be able to assert their claim in federal court. Although this may be the outcome in some cases, it is neither contradictory nor unpredictable. With this Court's decisions in *Williamson County* and *San Remo*, there should be no doubt that a Fifth Amendment takings claim cannot be brought in federal district court if there a reasonable, certain, and adequate provision for compensation that is available under state law. There should also be no question regarding the application of *res judicata* to state court decisions. The predictability of the rules set forth by this Court is evidenced by the fact that Petitioner has cited no case occurring after *San Remo* in the context of his "unpredictable" argument. *See* Pet. Brief, pages 16-21.

Despite Petitioner's arguments to the contrary, Plaintiffs asserting federal claims do not have any constitutional right to a federal forum and it is therefore not contradictory to apply the state compensation requirement. *Allen v. McCurry*, 449 U.S. 90, 103-04, 101 S.Ct. 411, 419-20, 66 L.Ed.2d 308 (1980); *Matsushita Electric Indus. Co. v. Epstein*, 516 U.S. 367, 386, 116 S.Ct.873, 883, 134 L.Ed.2d 6 (1996). In rejecting the plaintiff's argument that he had a right to vindicate federal claims in a federal forum, the Court in *San Remo* stated:

> We have repeatedly held, to the contrary, that issues actually decided in valid state-court judgment may well deprive plaintiffs of the 'right' to have their federal claims relitigated in federal court...This is so even when the plaintiff would have preferred not to litigate in state court, but was required to do so by statute or prudential rules.

545 U.S. at 342 (citations omitted). The mere fact that a plaintiff's takings claims is litigated in state court produces no untoward result because state courts are deemed fully capable of interpreting and upholding federal law. *Moore v. Sims*, 442 U.S. 415, 429, 99 S.Ct. 2371, 2380, 60 L.Ed.2d 994 (1979) ; *Stone v. Powell*, 428 U.S. 465, 493-94, n. 35, 96 S.Ct. 3037, 3051-52, n. 35, 49 L.Ed.2d 1067 (1976).

Petitioner's suggestion that the state compensation requirement "completely terminates the takings claim" and "deprives the plaintiffs of their Seventh Amendment right to a jury trial" is without merit. Although it is true that a takings plaintiff may be required to litigate his federal constitutional claim in state court, the claim is not eliminated but is instead adjudicated by a state court. Moreover, this Court rejected the "deprivation of jury trial argument" in *Parratt*, stating:

> Although the state remedies may not provide the respondent with all the relief

> which may have been available if he could have proceeded under § 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process. The remedies provided could have fully compensated the respondent for the property loss he suffered, and we hold they are sufficient to satisfy the requirements of due process.

Parratt v. Taylor, 451 U.S. 527, 544, 101 S. Ct. 1908 (1908), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986). In short, Petitioner's implicit and overriding argument that he is entitled to a federal forum was soundly rejected by the Court in *San Remo*. 545 U.S. at 342.

Petitioner's argument also fails to recognize that in considering whether the state compensation requirement is met, federal courts are required to determine whether state law provides a "reasonable, certain and adequate provision for obtaining compensation." *Williamson County*, 473 U.S. at 194.

If the plaintiff proves the state provision is non-existent, unreasonable, uncertain or inadequate or if resort to such provision would be futile, the plaintiff may proceed with his takings claim in federal court.

C. The State Compensation Requirement Does Not Conflict With Removal Jurisdiction

Petitioner implicitly suggests there is continuing confusion because of some defendants attempts to remove takings claims. The cases relied on by Petitioner, however, suggest that any confusion was caused by the plaintiffs' pleading, and not the *Williamson County* state compensation requirement. In *Moore v. Covinton County Comm'n*, 2007 WL 1771384 (M.D. Ala. 2007), the plaintiff had alleged takings claims *and* violations of the equal protection clause. In the remand order, the court found the equal protection violations were not well pled. In *Doney v. Pacific County*, 2007 WL 1381515 (W.D. Wash. 2007), the plaintiff's complaint alleged takings claims *and* violations of substantive due process. Although the court remanded the takings claims, it exercised jurisdiction over and dismissed the due process claim. Also in *Carrollton Properties, Ltd. v. City of Carrollton, Texas*, 2006 WL 2559535 (E.D. Tex. 2006), the complaint alleged takings *and* due process claims. In its remand order, the court determined the due process claim was, in fact, a takings claim.

A defendant that removes a state court action asserting a Fifth Amendment takings claim knows, or should know from this Court's decisions in *Williamson County* and *San Remo*, that it risks remand if the federal district court finds the state compensation requirement

has not been met. A plaintiff that allows such removal without objection faces the same risks.

Although the state compensation requirement may be a trap for litigants whose counsel have not reviewed the law, the requirement is well-established and is not a trap at all.

Petitioner suggests, and Amicus contend, that this Court in *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 118 S.Ct. 523, 139 L.Ed.2d 525 (1997), "found removal to federal court appropriate for a federal takings claim." Petitioner and Amicus' statement, however, is unsupported by the *City of Chicago* opinion or the history of that case. As reflected in the district court's opinion, the action was in the lower court "on removal from the state court, given plaintiff's federal constitutional claims that [the defendants' conduct] violated various of plaintiffs' federal *due process and equal protection rights.*" *Intern'l College of Surgeons v. City of Chicago*, 1995 WL 9243, p. 2 (N.D. Ill. 1995) (emphasis added), *rev'd*, 91 F.3d 981 (7th Cir. 1996), *rev'd*, 522 U.S. 157 (1997).

While a federal takings claim was also alleged, it was dismissed with prejudice and all that remained was a takings claim brought under the Illinois Constitution. *Id.* at p. 2, 15. The issue before this Court in *City of Chicago* was whether the federal district court had supplemental jurisdiction over state claims which called for deferential on-the-record review of administrative findings. The Court in *City of Chicago* did not suggest, or

even imply, that removal jurisdiction was predicated on a Fifth Amendment takings claim.

D. Acceptance of Petitioner's theory would impose an unnecessary undue burden on States and their municipalities

The essence of Petitioner's argument is that a property owner should be entitled to assert a Fifth Amendment takings claim in a federal district court at the moment of any taking. Under this theory, the state actor can conceivably avoid a takings claim only if and when a pre-deprivation process has occurred.

As an initial matter, this theory is directly contrary to century-old takings jurisprudence holding the Fifth Amendment does not require compensation to be paid prior to or contemporaneously with the taking. *See, e.g., Cherokee Nation*, 135 U.S. at 659; *Joslin*, 262 U.S. at 677.

From a practical standpoint, such requirement would require the State actor to weigh the risk of a federal lawsuit against a possible exigent need for the taking of the property. Under the *Williamson County* state compensation requirement, post-deprivation compensation to property owners undoubtedly avoids takings litigation in a number of cases.

Under Petitioner's theory, however, the property owner would be entitled to file in lawsuit in federal district court the instant a physical invasion occurs. Allowing such action would not only turn this Court's

takings jurisprudence on its head, it would allow property owners a federal forum the instant a physical intrusion has occurred, thus causing a backlog in an already overloaded federal court system.

The result sought by Petitioner and Amicus Curiae is neither contemplated, nor required, by the Fifth Amendment takings clause. Property owners know, or should know that they must seek compensation under state compensation laws. If an aggrieved property owner does not believe he has sufficiently reasonable, certain, and adequate remedy under state law, he can pursue his takings claim in federal court, with full knowledge that the case may be dismissed if the court finds such provision is available. The property owner does not lose his Fifth Amendment takings claim; to the contrary, he can fully litigate that claim in state court.

Petitioner and Amicus Curiae also assert untold injury because they are required to first seek compensation under the state's compensation provisions. Their argument of "unfairness" or "prejudice" necessarily presumes state courts are incapable of fairly compensating property owners when a taking has occurred. This presumption is just that, with no support in case law or otherwise. As this Court has acknowledged "state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations". *San Remo*, 545 U.S. at 347. The unsupported "unfairness" arguments of Petition and Amicus Curiae should be disregarded.

III. *Williamson County* Applies to Allegations Of Physical Takings

Petitioner contends *Williamson County* should apply only to cases involving regulatory takings, and not those involving physical takings. Prior to *Williamson County*, this Court applied a *Williamson County* - type analysis to alleged physical takings and there is no reasoned basis for excluding physical takings from the state compensation requirement. *See, e.g., Yearsley*, 309 U.S. at 21; *Hurley*, 285 U.S. at 104; *Cherokee Nation*, 135 U.S. at 658-659.

The Court in *Williamson County* "drew no distinction between physical and regulatory takings, and the rationale of that case, that a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State...demonstrates that any such distinction would be unjustified." *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 380 (2nd Cir. 1995), *cert denied*, 519 U.S. 808 (1966). *See also McKenzie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1997) (rejecting argument that *Williamson County* did not apply to physical takings); *Belvedere Military Corp. v. County of Palm Beach, Florida*, 845 F. Supp. 877 (S.D. Fla. 1994) (rationale of *Williamson County* equally applicable to physical takings).[7]

---

[7] In the Amicus Brief filed by The Coalition for Property Rights, Amicus contend the court in *Asociacion de Subscripcion*

Petitioner's suggestion that physical takings claims have historically warranted scrutiny in federal courts is unsupported by his cited case law as *none* address a Fifth Amendment takings claim against a State government or municipality, *most* do not even address a *physical takings* claim and *none* support the proposition that a federal district court will consider a takings claim when there is a state provision for reasonable, certain, and adequate compensation.

For example, Petitioner cites *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20, 28 S.Ct.7 , 52 L.Ed. 78 (1907). In that case, the plaintiff complaining of unequal tax assessments alleged a taking of "of property without

---

Conjunta Del Seguro De Reponsabilidad Obligatorio v. Flores Galarza, 484 F.3d 1 (1st Cir. 2007) declared *Williamson County* was only applicable to regulatory takings. *See* Coalition for Property Rights Brief, page 8. The *Flores Galarza* court held only that the final decision prong of *Williamson County* was inapplicable to physical takings. 484 F.3d at 15. Amicus also erroneously contend the First Circuit in *Flores Galarza* "determined that *Williamson County's* procedures does not include litigation at all" and that ripeness is satisfied if "all administrative avenues of relief have been cut off." *See* Coalition for Property Rights Brief, page 11; *see also* Brief Amicus Curiae of The American Farm Bureau Federation, page 6, fn. 2. Amicus reads *Flores Galarza* far too broadly as that court recognized *Williamson County* would require "plaintiffs to avail themselves of [an inverse condemnation cause of action] before bringing a federal takings claim..." *Flores Galarza*, 484 F.3d at 17. The *Flores Galarza* court distinguished between "a state takings claim" [which it found was not required by *Williamson County*] and "an inverse condemnation proceeding [which would be required by *Williamson County*] designed to enable plaintiffs to obtain compensation." 484 F.3d at 18.

due process of law" and a denial of "the equal protection of laws", but there was *no* allegation of a physical taking without just compensation. 207 U.S. at 20. The issues before the Court in *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U.S. 278, 33 S.Ct. 312, 57 L.Ed.510 (1913) likewise did not involve a physical takings claim, but were instead alleged violations of due process arising from a state regulation. In *Western Union Telegraph Co. v. Pennsylvania Railroad Co.*, 195 U.S. 540, 25 S.Ct. 133, 49 L.Ed. 312 (1904), the "construction of the [act of 1866 was] the fundamental question in the case" and the court concluded the act was an exercise of Congress of its power to withdraw from state interference interstate commerce by telegraph. 195 U.S. at 559, 571.

In *United States v. General Motors*, 323 U.S. 373, 65 S.Ct.357, 89 L.Ed. 311 (1945), the United States initiated proceedings to condemn property pursuant to the Second War Powers Act. 323 U.S. at 358. The issue before this Court was the "scope and meaning of" of the takings clause, and not whether a takings claim arising from a state actor taking could be considered by a federal court. 323 U.S. at 377.

The Court's decision in *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979) likewise does not support Petitioner's position. In that case, the issue was whether the government's imposition of a navigational servitude constituted a taking for which just compensation was owed. The underlying action was brought by the United States in

federal district court to determine its regulatory authority and there was no attempt by *Kaiser* to seek "just compensation" in that proceeding. 444 U.S. at 168.

Conspicuously missing from Petitioner's "history" of takings jurisprudence is any citation to *Cherokee Nation, Joslin, Sweet,* or any other historic case indicating the Fifth Amendment takings requirement is satisfied where, at the time of the taking, there is a *reasonable, certain and adequate provision* for obtaining compensation. Petitioner's analysis and case law citations are inapposite and do not support the proposition that *Williamson County* is inapplicable to physical takings.

IV. The doctrine of *stare decisis* warrants denial of Petitioner's Petition for Writ of Certiorari

The doctrine of stare decisis is not an "inexorable command," particularly where an interpretation of the Constitution is at issue. *Dickerson v. United States*, 530 U.S. 428, 443, 120 S.Ct. 2326, 2336, 147 L.Ed.2d 405 (2000). However, "even in constitutional cases, the doctrine carries such persuasive force that [the Court] has always required a departure from precedent to be supported by some 'special justification.'" *Id.* (*quoting United States v. International Business Machines Corp.*, 517 U.S. 843, 856, 116 S.Ct. 1793, 135 L.Ed.2d 124 (1996) (*quoting Payne v. Tennessee*, 501 U.S. 808, 842, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) (Souter, J. concurring)).

As reflected by Petitioner's Brief, this Court has been asked on at least five occasions since *San Remo* to reconsider *Williamson County*. The same reasons for denying *certiorari* in those cases apply with equal force here. The Court's decision in *Williamson County* was not a blip on the radar screen but was instead a recitation of pronouncements made by this Court in the preceding 100 years. Neither Petitioner nor Amicus Curiae have identified any "special justification" for overruling *Williamson County* and the century old takings jurisprudence reflected in that decision. Denial of Petitioner's Petition is warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

James C. Kearns
Heyl, Royster, Voelker & Allen
102 E. Main Street, Suite 300
Urbana, IL 61801
(217) 344-0060
Counsel for Respondent

FILED
FEB 8 - 2008
OFFICE OF THE CLERK
SUPREME COURT

No. 07-635

In the Supreme Court of the United States

BRUCE PETERS,

Petitioner,

v.

VILLAGE OF CLIFTON, an Illinois municipal corporation; ALEXANDER, COX & McTAGGERT, INC.; and JOSEPH McTAGGERT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. DAVID BREEMER
Counsel of Record
R. S. RADFORD
Pacific Legal Foundation
3900 Lennane Drive,
Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

REPLY ARGUMENT 2

I. THE ONLY ISSUE PROPERLY BEFORE THE COURT IS THE VIABILITY OF *WILLIAMSON COUNTY'S* SECOND RIPENESS RULE 2

II. RESPONDENTS FAIL TO IDENTIFY ANY JUSTIFICATION FOR RETAINING *WILLIAMSON COUNTY'S* STATE COMPENSATION RIPENESS PREDICATE 6

A. Early Decisions Like *Cherokee Nation* Do Not Supply a Doctrinal Basis for *Williamson County*, but Instead Highlight Its Novelty 6

B. The Tucker Act Procedure for Just Compensation Suits Against the Federal Government Does Not Justify a "Go to State Court" Ripeness Requirement 8

TABLE OF CONTENTS—Continued

Page

III. THE CASE PRESENTS A FUNDAMENTAL AND IMPORTANT DISAGREEMENT ABOUT WHEN A PROPERTY OWNER CAN INVOKE THE "SELF-EXECUTING" FEDERAL JUST COMPENSATION PROVISION 10

CONCLUSION 13

TABLE OF AUTHORITIES

Page

Cases

Armstrong v. United States, 364 U.S. 40 (1960) . . 11

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) 4

Cherokee Nation v. Southern Kan. Ry. Co., 135 U.S. 641 (1890) 6-8

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) 4-6, 11

J. Truett Payne Co., Inc. v. Chrysler Motors Corp., 451 U.S. 557 (1981) 6

Jacobs v. United States, 290 U.S. 13 (1933) 11

Joslin Mfg. Co. v. City of Providence, 262 U.S. 668 (1923) 7

Kelo v. City of New London, 545 U.S. 469 (2005) . . . 1

Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) 3

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005) 9

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) . . . 3

Preseault v. ICC, 494 U.S. 1 (1990) 9

Regents of the University of California v. Doe, 519 U.S. 425 (1997) 2

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) 8-9

TABLE OF AUTHORITIES—Continued

Page

San Remo Hotel v. City and County of San Francisco, 545 U.S. 323 (2005) 1, 8, 12

Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997) 3

United States v. Clarke, 445 U.S. 253 (1980) 11

Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) 1, 6, 9-10

Federal Statutes

42 U.S.C. § 1983 4

Rules of Court

U.S. Sup. Ct. R. 14.1(a) 2

INTRODUCTION

In *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323 (2005), four Justices of this Court expressed a desire to find an "appropriate case" to revisit the portion of *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985), holding that a federal takings claim will not lie until the property owner "ripens" the claim by unsuccessfully seeking compensation in state procedures. *San Remo*, 545 U.S. 323, 351 (2005) (Renhquist, C.J., concurring). This case is the awaited vehicle. It involves a physical invasion of Petitioner Bruce Peters' (Peters) farm, authorized by the Village of Clifton, for the public purpose of disposing of the Village's excess sewage and to promote commercial development that would increase its revenues.[1] Peters sought an injunction and monetary compensation. The only issue addressed below was the issue of jurisdiction, and particularly, whether Peters' claim was unripe in the federal forum because he first had to litigate a state law compensation claim in state courts. In the Seventh Circuit, Peters expressly raised the issue of whether the court should follow *Williamson County's* state procedures ripeness rule in light of the heavy criticism heaped on the rule by the San Remo Justices. The lower court chose to strictly apply the rule to require dismissal of Peters' claim, compelling Peters to seek this Court's review.

In their Opposition to the Petition (Opposition), Respondents identify nothing that warrants avoidance of the important federal jurisdictional issue raised by

---

[1] *See Kelo v. City of New London*, 545 U.S. 469 (2005) (economic development designed to benefit public treasury qualifies as a public use).

this case. Rather, the Opposition reinforces the need for review by highlighting a substantial debate about whether state court litigation is a proper federal jurisdictional predicate for a Fifth Amendment takings claim. Although Respondents say that this debate is unworthy of this Court's attention, four Justices of this Court have clearly stated differently, believing *Williamson County* is "mistaken" and worthy of reconsideration.

REPLY ARGUMENT

I

THE ONLY ISSUE PROPERLY BEFORE THE COURT IS THE VIABILITY OF *WILLIAMSON COUNTY'S* SECOND RIPENESS RULE

Respondents assert that the Court should not use this case to address the issue of whether *Williamson County's* state procedures takings predicate remains good law because Peters "has not [otherwise] pled a viable takings claim." Opp. at 5. The argument seems to be that Peters' claim would fail to state a Fifth Amendment takings claim if tested on non-ripeness grounds, and that *Williamson County* should not be addressed here until this occurs. *Id.*, at 4-5. There is nothing to this. The Petition raised only *Williamson County* ripeness issues, and Respondents' "failure to state a claim" question, *see* Opp. at 3, is not fairly included therein; they cannot inject the issue now. U.S. Sup. Ct. R. 14.1(a); *Regents of the University of California v. Doe*, 519 U.S. 425, 432 (1997) (Court will not address issues raised by Respondent when not included in the Petition.). Moreover, as described

below, the only issue addressed and decided below was whether Peters' takings claim is barred by *Williamson County's* state procedures requirement. Consequently, that *Williamson County* issue is all that can or should be decided in this forum.

Consistent with this Court's precedent,[2] Respondents asserted, and the lower courts treated, *Williamson County's* state procedures rule as a *threshold* jurisdictional barrier that is applicable at the outset to allegations—like those here—that a property owner has suffered an unconstitutional invasion of his property. Petition for Writ of Certiorari, Appendix (App.) at A-6, 16. Thus, the issue was approached as one that must be resolved before any other challenge to the allegations could be considered. *See* App. at C-4 (district court stating: "[r]ipeness is an issue of subject matter jurisdiction, therefore the Court will address Defendant's ripeness argument first. If the case is not ripe . . . we must dismiss . . . for lack of subject matter jurisdiction"). The lower courts consequently assumed that Peters' complaint raised a federal takings claim that implicated *Williamson County*, App. at A-13-15; App. at C-5. They refused to pass on any different argument, including the "ultra vires" "failure to state a claim" contentions raised now by Respondents.[3] *See*

---

[2] *See, e.g., Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001) (ripeness is a "threshold consideration"); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736, 733-34 (1997); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 398 (1979).

[3] In arguing that Peters' allegations would fail to state a viable claim due to purported "ultra vires" allegations, Respondents do not accurately summarize the proceedings below. Peters' (continued...)

App. at A-4, n.1 (noting, without otherwise addressing, that "Mr. Peters claims that . . . both the Village and the private defendants were acting under color of state law for purposes of liability under 42 U.S.C. § 1983"). This was likely because such arguments were considered secondary and irrelevant to the *Williamson County* issue.

In light of this posture, the only issues this Court need address are the same *Williamson County* questions raised by the Petition and passed on by the lower court. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 312 (1987); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397-98 (1971) (Court will not consider issue not passed upon by the Court of Appeals.). Indeed, in *First English*, the Court rejected an argument, quite like the one here, that this Court had to independently test the legal sufficiency of a takings complaint before addressing the issue of whether damages was a proper remedy. The Court explained:

---

[3] (...continued)
complaint alleged the taking he suffered was conducted under color of state law and authorized by the Township. He characterized the taking as "illegal" in the sense of being outside statutory authority, but did not allege the taking was constitutionally "illegitimate" in the sense of being for a private use. In the district court, no one discussed "ultra vires" takings. In the Seventh Circuit, Peters briefly contended that an injunction under the Fifth Amendment may be available if the taking was "ultra vires," while independently pressing his claim for just compensation. Respondents argued that any issue along these lines was waived. The Seventh Circuit refused to pass on the issue, deciding the case solely under *Williamson County*.

> We reject appellee's suggestion that, regardless of the state court's treatment of the question, we must independently evaluate the adequacy of the complaint and resolve the takings claim on the merits before we can reach the remedial question. However "cryptic"—to use appellee's description—the allegations with respect to the taking were, the California courts deemed them sufficient to present the issue. We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations. [Citations omitted.] These questions, of course, remain open for decision on the remand we direct today.

First English, 482 U.S. at 312-13.

These considerations apply here. Whether or not Respondent believes Peters' allegations fail to state a viable Fifth Amendment taking claim, the federal courts "deemed them sufficient to present the issue" of whether the claim is ripe under *Williamson County's* state compensation procedures rule. That issue was then directly addressed and its resolution formed the only basis for dismissal of Peters' complaint. While there may be other potential arguments available to Respondents—including the disputed contention that Peters does not state a viable claim because he

challenges ultra vires action[4]—this Court has no occasion to decide them before considering *Williamson County*. *Id; see also, J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981) (declining to address liability issue where Court of Appeals bypassed issue and "went directly to issue of damages"). Such "questions, of course, remain open for decision on . . . remand" should the Court grant the Petition and vacate the lower court opinion, but they are not at issue here. *First English*, 482 U.S. at 313.

II

RESPONDENTS FAIL TO IDENTIFY ANY JUSTIFICATION FOR RETAINING *WILLIAMSON COUNTY'S* STATE COMPENSATION RIPENESS PREDICATE

On the cental issue presented by the Petition—whether the Court should overrule *Williamson County's* state procedures rule—Respondents strive to find some precedential basis that might save the rule. The effort fails.

A. Early Decisions Like *Cherokee Nation* Do Not Supply a Doctrinal Basis for *Williamson County*, but Instead Highlight Its Novelty

Respondents initially point to two early decisions, *Cherokee Nation v. Southern Kan. Ry. Co.*, 135 U.S.

---

[4] Peters disagrees on the merits with Respondents' argument that an "illegal" taking (one outside statutory authority), conducted under color of state law for a public use cannot be challenged under the Takings Clause. But this is not the proper forum for that debate; if the case is remanded, Respondents can take it up in district court.

641 (1890), and *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668 (1923), as a legitimate "underlying basis for the *Williamson County*" state procedures predicate. Opp. at 5. They are nothing of the sort. *Cherokee Nation* and *Joslin Mfg.* considered whether a property invasion could be enjoined as a violation of the Takings Clause, in part because it occurred without immediate payment of compensation. *Cherokee Nation*, 135 U.S. at 651. The Court held that all the Takings Clause demanded was a certain post-taking compensation provision, that such provisions existed, and that there was no constitutional infraction. *Cherokee Nation*, 135 U.S. at 659.

These decisions bear no similarity to *Williamson County*. Unlike *Williamson County*, they did not treat post-taking compensation procedures as a *ripeness* predicate that must be pursued before the Fifth Amendment takings claim can be raised. To the contrary, they reviewed such takings claims *on the merits*. *Cherokee Nation*, 135 U.S. at 656-61. Moreover, neither *Cherokee Nation or Joslin Mfg.* identify *state court* as a required post-taking compensation procedure; they contemplated a *federal* trial on damages, pursuant to the statutes causing the taking. Indeed, the federal takings litigation in *Cherokee Nation* occurred (without controversy) in *federal* court. *See id.*

All *Cherokee Nation* and *Joslin Mfg.* stand for is the uncontested proposition that damages do not have to be in the owner's hands prior to the taking.[5]

---

[5] Contrary to Respondents' beliefs, Opp. at 11, Peters is not demanding that money had to be handed to him at the moment of the invasion. He simply contends that he can pursue the

(continued...)

Cherokee Nation, 135 U.S. at 659. It takes a giant leap in logic to get from this basic idea to *Williamson County's* conclusion that a claimant cannot seek compensation under the "self-executing" federal Compensation Clause until he uses state law compensation procedures in state court. This leap is not explained by Respondents' early decisions; instead, they just beg the question of how *Williamson County's* state compensation rule became law.

B. The Tucker Act Procedure for Just Compensation Suits Against the Federal Government Does Not Justify a "Go to State Court" Ripeness Requirement

Respondents fall back on one of *Williamson County's* own explanations for the state procedures requirement; namely, an analogy to Tucker Act takings suits against the United States in the Court of Federal Claims. Opp. at 7-8. In so doing, Respondents fail to note that the *San Remo* concurrence criticized this basis for *Williamson County*. *See San Remo*, 545 U.S. at 349, n.1 (Rehnquist, C.J.) (concurring). Nor do they refute the able attack on the Tucker Act/*Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984), justification leveled by amicus curiae Elizabeth J. Neumont, with which the *San Remo* concurrence agreed. *San Remo*, 545 U.S. at 349, n.1 (Rehnquist, C.J.).

---

[5] (...continued)
compensation provision promised by the federal Just Compensation Clause at the time of the taking without having to use state procedures.

Respondents do make much of *Preseault v. ICC*, 494 U.S. 1 (1990), *see* Opp. 8 n.2, but *Preseault* says nothing to support *Williamson County's* "go to state court first" rule. To the contrary, *Preseault* is just another inapposite case applying the rule that "[e]quitable relief is not available to enjoin an alleged taking of private property for public use . . . when a suit for compensation can be brought against the sovereign subsequent to the taking." *Ruckelshaus*, 467 U.S. at 1016. As in *Monsanto*, the *Preseault* plaintiffs sought only injunctive relief, claiming the statutory authority for an ICC Order was "unconstitutional on its face because it takes private property without just compensation." *Preseault*, 494 U.S. at 10. *Preseault* did not hold that relief unripe, but categorically not available, because a suit for compensation could be brought against the federal government in the court of claims subsequent to the taking. *Id.* at 12.

Preseault did repeat the unfortunate line from *Williamson County* that "taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act." *Id.* at 11 (quoting *Williamson County*, 473 U.S. at 195). But for the reasons set forth in the Neumont Amici Brief at 11-12, that notion is nonsensical, and no amount of repetition can make it otherwise. *Cf. Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 531 (2005) ("On occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase—however fortuitously coined."); ("Today we correct course."), *id.* at 548.

III

THE CASE PRESENTS A FUNDAMENTAL AND IMPORTANT DISAGREEMENT ABOUT WHEN A PROPERTY OWNER CAN INVOKE THE "SELF-EXECUTING" FEDERAL JUST COMPENSATION PROVISION

At bottom, Respondent's Opposition rests on faith in the basic rule of *Williamson County*, *see* Opp. at 9, 11-12. In this way, the Opposition highlights the important disagreement on the timing of a suit under the federal Just Compensation Clause raised by this case. Respondents believe that

> [w]hether there has been a taking without just compensation therefore depends on whether, *at the time of the taking*, the plaintiff has a remedy under state law which is sufficiently reasonable, certain and adequate to secure just compensation . . . . Because of the express "just compensation" prerequisite, the State's action is not " 'complete' until the State fails to provide adequate compensation for the taking.' Opp. at 12 (quoting *Williamson County*, 473 U.S. at 195) (italics in original, underline added).

Respondents try to favorably contrast the above position with the idea (which they wrongly attribute to Peters) that money damages should be handed over at the time of the taking. However, this is not the right comparison, because it is not Peters' position. As Respondents eventually acknowledge, Opp. at 18, Peters contends that when private property is invaded,

the property owner has an immediate right to invoke the self-executing just compensation remedy promised by the Takings Clause, and because this is a federal question, he may do so in federal court. When Peters stated that "the issue of whether the taking is 'without just compensation' should also be ascertained at" the time of the taking, he meant that the federal Just Compensation Clause becomes actionable in federal (or state) court at that point.

This case accordingly offers diametrically opposed positions on the proper timing of a claim for compensation under the Fifth Amendment, and thus, on whether *Williamson County* was correct in demanding state court compensation proceedings as a initial predicate. While the Village defends the idea that state court and state law must come first, Peters contends that the federal Just Compensation Clause provides an actionable federal remedy at the time of the taking. The bulk of this Court's jurisprudence supports Peters' position. *See, e.g, First English*, 482 U.S. at 315 ("[A] landowner is entitled to bring an action in inverse condemnation as a result of 'the self-executing character of the constitutional provision with respect to compensation. . . .') (quoting *United States v. Clarke*, 445 U.S. 253, 257 (1980)); *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (a property invasion triggers the federal "constitutional obligation to pay just compensation"); *Jacobs v. United States*, 290 U.S. 13, 16 (1933) (the right to sue for just compensation "rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. The suits were thus founded upon the Constitution of the United States."). Against this precedent stands

Williamson County's state compensation predicate. This case thus cleanly sets the stage for the reevaluation of the state procedures rule urged by the *San Remo* concurrence. *See San Remo*, 545 U.S.at 352 (Rehnquist, C.J., concurring) ("[T]he Court should reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts.").

Respondents lament that it would be a "burden" if *Williamson* were altered along the lines suggested by Peters because they would have to "weigh the risk of a federal lawsuit against a possible [] need for the taking of the property." Opp. at 18. If it can be called a "burden" for the government to weigh and potentially face a claim under the Just Compensation Clause when it takes property, it is one imposed by the Constitution. Moreover, the possibility of having to answer in federal court for just compensation is no different than the "burden" local governments already face in answering for damages when they unreasonably seize property or engage in any other conduct violative of the United States Constitution. The Just Compensation Clause is a part of the Constitution, too, and like other provisions, it is designed to condition and constrain the exercise of official power. *Williamson County* provides no legitimate reason why this federal constraint should await state law litigation in state court, particularly where this creates "some real [jurisdictional] anomalies, justifying our revisiting the issue." *San Remo*, 545 at 351 (Rehnquist, C.J., concurring).

CONCLUSION

The Court should grant the Petition.

DATED: February, 2008.

Respectfully submitted,

J. DAVID BREEMER
Counsel of Record
R.S. RADFORD
Pacific Legal Foundation
3900 Lennane Drive,
Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Petitioner

77
MOTION FILED
DEC 17 2007

No. 07-635

In the Supreme Court of the United States

BRUCE PETERS,

Petitioner,

v.

VILLAGE OF CLIFTON, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER

JULIE ANNA POTTS
General Counsel
DANIELLE QUIST
American Farm Bureau Federation
600 Maryland Ave., SW
Washington, D.C. 20024
(202) 406-3616

TIMOTHY S. BISHOP
Counsel of Record
J. BISHOP GREWELL
Mayer Brown LLP
71 South Wacker Dr.
Chicago, IL 60606
(312) 782-0600

Counsel for Amicus Curiae

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(b), the American Farm Bureau Federation ("Farm Bureau") moves for leave to file the attached brief *amicus curiae*. Counsel for petitioner has consented to the filing of this brief and a copy of that consent has been filed with the Clerk. Counsel for respondent has declined to consent.

The Farm Bureau is a voluntary general farm organization established in 1919 to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. Farm Bureau has member organizations in 50 states and Puerto Rico, representing more than 6.2 million member families. It has regularly participated as *amicus curiae* in this Court in cases involving the interpretation of the Takings Clause of the Fifth Amendment to the Constitution, including *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), *Suitum* v. *Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), *City of Monterey* v. *Del Monte Dunes*, 526 U.S. 687 (1999), and *Palazzolo* v. *Rhode Island*, 533 U.S. 606 (2001).

Farm Bureau's members own or lease substantial amounts of land, on which they depend for their livelihoods and on which all Americans depend for the supply of high quality, affordable food, fiber, and other basic necessities. Because that land is subject to increasingly onerous regulation from all levels of state and local government—as well as to the sort of competing uses that resulted in a physical invasion of petitioner's farmland in this case—Farm Bureau and its members are vitally interested in the proce-

dural rules surrounding claims to just compensation under the Takings Clause.

In particular, Farm Bureau believes the exhaustion of state remedies requirement set forth in *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 195 (1985)—when combined with standard rules of issue and claim preclusion applied by federal courts—effectively denies its members a federal forum for their federal takings claims, and thereby improperly relegates the Takings Clause "to the status of a poor relation" to other provisions of the Bill of Rights. *Dolan*, 512 U.S. at 392. Added on top of already onerous ripeness standards, the exhaustion requirement also guarantees that, even if a claim could survive preclusion rules, most farmers and ranchers could not hope to sustain the cost of complex litigation to vindicate Fifth Amendment rights through a state court trial and multiple appeals before reaching a federal forum.

As members of this Court have already recognized, the reasoning of *Williamson County* is seriously flawed. Its exhaustion holding has no basis in the language or history of the Fifth Amendment and does not warrant *stare decisis*. That holding has done enough damage to the individual rights of property owners and should now be overruled.

Given its long-standing interest in Takings Clause jurisprudence and the experience of its members with *Williamson County*, the Farm Bureau believes that its perspective regarding the need to revisit that decision's exhaustion requirement will be useful to the Court. Farm Bureau thus requests this Court grant its motion for leave to file the attached brief *amicus curiae* in support of petitioner.

Respectfully submitted.

JULIE ANNA POTTS
General Counsel
DANIELLE QUIST
American Farm Bureau Federation
600 Maryland Ave., SW
Washington, D.C. 20024
(202) 406-3616

TIMOTHY S. BISHOP
Counsel of Record
J. BISHOP GREWELL
Mayer Brown LLP
71 South Wacker Dr.
Chicago, IL 60606
(312) 782-0600

Counsel for Amicus Curiae

DECEMBER 2007

QUESTION PRESENTED

Whether this Court should overrule *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 195 (1985), insofar as it held that property owners must pursue a compensation claim in state court in order to ripen a federal takings claim.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. This Case Is An Appropriate Vehicle, And The Time Is Right, To Reconsider *Williamson County* 4

II. *Williamson County's* Exhaustion Requirement Does Not Warrant *Stare Decisis* 6

A. *Williamson County's* Flawed Reasoning Has Resulted In A Scheme That Is Unworkable In Practice. 8

B. *Williamson County* Is Not Relied Upon By The Public 10

C. *Williamson County's* Doctrinal Underpinnings Have Eroded Away. 11

III. *Williamson County's* Exhaustion Requirement Is Fundamentally Mistaken And Especially Harmful To Farmers And Ranchers 12

A. The State Litigation Rule Is Illogical. 12

B. Farmers And Ranchers Are Particularly Harmed By *Williamson County*. 14

TABLE OF CONTENTS—continued

Page

CONCLUSION 16

TABLE OF AUTHORITIES

Page

Cases

Agostini v. *Felton*, 521 U.S. 203 (1997) 7

Aguilar v. *Felton*, 473 U.S. 402 (1985) 7

Albrecht v. *Herald Co.*, 390 U.S. 145 (1968).....7

Asociación de Subscripción Conjunta del Seguro de Responsibilidad Obligatorio v. *Flores Galarza*, 484 F.3d 1 (1st Cir. 2007).....6

City of Chicago v. *Int'l College of Surgeons*, 522 U.S. 156 (1997).....11

City of Monterey v. *Del Monte Dunes*, 526 U.S. 687 (1999).....11

Dickerson v. *United States*, 530 U.S. 428 (2000).....7

DLX, Inc. v. *Kentucky*, 381 F.3d 511 (6th Cir. 2004).....5

Dolan v. *City of Tigard*, 512 U.S. 374 (1994) 2, 8

England v. *Louisiana Bd. of Medical Examiners*, 375 U.S. 411 (1964).....14

Fields v. *Sarasota Manatee Airport Auth.*, 53 F.2d 1299 (11th Cir. 1992) 5

Front Royal & Warren County Indus. Park Corp. v. *Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998).....5

TABLE OF AUTHORITIES—continued

Page(s)

Garcia v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).....7

Kottschade v. *City of Rochester*, 319 F.3d 1038 (8th Cir. 2003).....11

Leegin Creative Leather Prods. v. *PSKS, Inc.*, 127 S. Ct. 2705 (2007) 6, 7, 11

Mitchum v. *Foster*, 407 U.S. 225 (1972) 9

Monroe v. *Pape*, 365 U.S. 167 (1961) 13

National League of Cities v. *Usery*, 426 U.S. 833 (1976).....7

Parratt v. *Taylor*, 451 U.S. 527 (1981) 9, 10

Payne v. *Tennessee*, 501 U.S. 808 (1991).....6, 7

Peters v. *Village of Clifton*, 498 F.3d 727 (7th Cir. 2007).....6

Preseault v. *Interstate Commerce Comm'n*, 494 U.S. 1 (1990).....13

Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974).....13

Ruckelshaus v. *Monsanto Co.*, 467 U.S. 986 (1984).....9, 13

San Remo Hotel v. *City & County of San Francisco*, 545 U.S. 323 (2005).....5, 7, 8, 12

TABLE OF AUTHORITIES—continued

Page(s)

Santini v. *Connecticut Hazardous Waste Mgt. Serv.*, 342 F.3d 118 (2d Cir. 2003).....5

Seminole Tribe v. *Florida*, 517 U.S. 44 (1996).....7

State Oil Co. v. *Khan*, 522 U.S. 3 (1997).....6, 7, 11

Tahoe-Sierra Preservation Council, Inc. v. *Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).....14

Williamson County Regional Planning Comm'n v. *Hamilton Bank*, 473 U.S. 172 (1985).....*passim*

Statutes

28 U.S.C. § 1441 11

28 U.S.C. § 1491 13

28 U.S.C. § 1738 5

42 U.S.C. § 1983 3

Miscellaneous

Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 URB. LAW. 671 (2004) 10

TABLE OF AUTHORITIES—continued

Page(s)

DAVID DANA & THOMAS MERRILL, PROPERTY: TAKINGS (2002) 3, 4

RICHARD H. FALLON ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (5th ed. 2003) 4

FEDERALIST NO. 10 (Madison) (C. Rossiter ed. 1961) 2

FEDERALIST NO. 54 (Madison) (C. Rossiter ed. 1961) 2

J. BISHOP GREWELL & CLAY J. LANDRY, ECOLOGICAL AGRARIAN: AGRICULTURE'S FIRST EVOLUTION IN 10,000 YEARS (2003) 16

RALPH E. HEIMLICH & WILLIAM D. ANDERSON, U.S. DEP'T OF AGRIC., DEVELOPMENT AT THE URBAN FRINGE AND BEYOND: IMPACTS ON AGRICULTURE AND RURAL LAND (2001) 16

Michael McConnell, *Contract Rights and Property Rights*, 76 CAL. L. REV. 267 (1988) 2

NATURAL RESOURCES CONSERVATION SERVICE, NATIONAL RESOURCES INVENTORY 2001 (available at http://www.nrcs.usda.gov/technical/land/nri01). ANNUAL NRI: URBANIZATION AND DEVELOPMENT OF RURAL LAND (2001) 14

TABLE OF AUTHORITIES—continued

Page(s)

JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM (1990) 2

Thomas Roberts, *Fifth Amendment Taking Claims in Federal Court: The State Compensation Requirement and Principles of Res Judicata*, 24 URB. LAW. 479 (1992) 8

Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1 (1995) 15

GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (First Vintage Books ed. 1993) 15

BRIEF AMICUS CURIAE OF THE AMERICAN FARM BUREAU FEDERATION

INTEREST OF THE AMICUS CURIAE

The interest of the *amicus curiae* American Farm Bureau Federation is set forth in the preceding motion for leave to file.[1]

SUMMARY OF ARGUMENT

The Framers of our Constitution placed property rights on equal footing with the other civil rights guaranteed in the Bill of Rights. The state litigation requirement invented in *Williamson County*, in contrast, operates in concert with full faith and credit requirements to make property a second-class right, effectively precluding federal litigation of takings violations against states and their subdivisions.

Two years ago, Chief Justice Rehnquist and Justices Kennedy, Thomas, and O'Connor suggested the time had come for this Court to reconsider *Williamson County*. This case is an appropriate vehicle in which to do so. Because *Williamson County* creates an unintended trap for takings litigants, denies a federal forum for the vindication of federal rights, creates unnecessary expense for litigants, and intended none of those consequences, it is untenable. *Stare decisis* is not required where, as here, a prece-

---

[1] This brief was not authored in whole or part by counsel for a party, and no person other than the *amicus curiae*, its members, and its counsel made a monetary contribution to its preparation and submission. *Amicus* Farm Bureau timely notified counsel for the parties of its intent to file this brief.

dent is unworkable, its reasoning is flawed, and it has been undermined by later doctrine.

ARGUMENT

"[P]rotection of private property was a nearly unanimous intention among the founding generation." Michael McConnell, *Contract Rights and Property Rights*, 76 CAL. L. REV. 267, 270 (1988). The Framers viewed the protection of property rights, and particularly rights in land, as "the first object of government." FEDERALIST NO. 10 (Madison) (C. Rossiter ed. 1961). That conviction rested on the Framers' understanding that private property constitutes "the clear, compelling, even defining, instance of the limits that private rights place on legitimate government." JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 9 (1990). Indeed, the Framers understood government to be "instituted no less for protection of the property, than of the persons, of individuals." FEDERALIST NO. 54, *supra*, at 339 (Madison). Accordingly, the Takings Clause, a bulwark against arbitrary rule that fosters respect for individuals and their rights to use and reap the benefits of their property, is fundamental to our constitutional order. As Chief Justice Rehnquist wrote for the Court, there is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation." *Dolan* v. *City of Tigard*, 512 U.S. 374, 392 (1994).

Yet that is precisely the effect of this Court's holding two decades ago in *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 195 (1985), that "if a State provides an adequate procedure for seeking just compensation, the prop-

erty owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." For, outside the takings context, it is the "general rule" that "plaintiffs who believe that they have been deprived of some federal constitutional right by state or local officials acting under color of law may bring an action in federal district court under 42 U.S.C. § 1983 without first bringing any sort of state lawsuit, even when state court actions addressing the underlying behavior are available." DAVID DANA & THOMAS MERRILL, PROPERTY: TAKINGS 262 (2002). In contrast to the state litigation (including appeals) required before a property owner may bring a Takings Clause action in federal court, "when an individual claims that his Fourth Amendment rights have been violated by an unwarranted search or seizure, he may bring a Section 1983 action without first bringing a state court tort action for trespass or battery." *Ibid.* And he may do so even though a state court tort action might redress the alleged violation as surely as a state court inverse condemnation claim might provide the compensation a landowner claims is due.

The impact of the *Williamson County* exhaustion requirement is that—unlike with other constitutional claims that may be brought under Section 1983—a takings plaintiff is denied an effective federal forum to vindicate its federal constitutional rights. The Takings Clause has attained the "poor relation" status *Dolan* warned against. If the landowner attempting to exhaust state remedies asserts a claim for compensation under the Fifth Amendment in state court, the state court's ruling on that claim will be binding in any subsequent federal takings suit under federal claim preclusion rules. If the landowner instead limits its state suit to state in-

verse condemnation or similar state law claims, the state court invariably will make determinations in that suit regarding issues that are also critical to a federal takings claim, and those determinations will bind a federal court considering a subsequent Fifth Amendment suit under normal federal issue preclusion rules. See generally RICHARD H. FALLON ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1406 (5th ed. 2003).

"As a result" of this "'*Williamson* trap,'" two leading scholars have observed, "there is almost no way to meet ripeness requirements for a takings challenge in federal court" and to avoid issue or claim preclusion. DANA & MERRILL, *supra*, at 263-264. A federal takings claim brought after satisfying *Williamson County's* exhaustion requirement may be "nominally permissible," but in fact it is "pointless." *Id.* at 264. It would be a waste of landowner and judicial resources, and even attempting it—after state court trial and appeals—would be prohibitively costly for most of *amicus* Farm Bureau's members.

This substantial burden on the vindication of property rights protected by the Constitution cannot be justified. Principles of *stare decisis* do not require that this Court continue to adhere to such a thoroughly mistaken precedent. Sound legal and policy reasons require that property owners should have access to a federal forum, like those complaining of the violation of other provisions of the Bill of Rights.

I. This Case Is An Appropriate Vehicle, And The Time Is Right, To Reconsider *Williamson County*.

Two years ago, Justices Kennedy, Thomas, and O'Connor joined Chief Justice Rehnquist in suggest-

ing that this Court should reconsider the state-litigation requirement of *Williamson County* in an "appropriate case." *San Remo Hotel* v. *City & County of San Francisco*, 545 U.S. 323, 352 (2005) (Rehnquist, C.J., concurring). In *San Remo* itself, the takings plaintiff had not preserved the argument that this aspect of *Williamson County* should be overruled. No such barrier to correcting the law exists here. This case presents a perfect vehicle, with no procedural defects. And because respondents are alleged to have engaged in a physical taking, final action is clearly involved and only the second prong of the *Williamson County* test—whether state litigation of just compensation is required to ripen the claim—is at issue.

San Remo arose from the efforts of courts of appeals to avoid the "*Williamson* trap." That trap occurs because *Williamson County's* state litigation requirement for a ripening takings claim in federal court necessarily precludes the case's subsequent litigation in federal court as a consequence of the full faith and credit statute, 28 U.S.C. § 1738. To avoid the unfair and constitutionally suspect results of the exhaustion rule, courts of appeals simply declined to apply full faith and credit to state court judgments. See, *e.g.*, *DLX, Inc.* v. *Kentucky*, 381 F.3d 511, 520-521, 523-524 (6th Cir. 2004) (avoiding the "unanticipated effect of *Williamson County*"); *Santini* v. *Connecticut Hazardous Waste Mgt. Serv.*, 342 F.3d 118, 127-130 (2d Cir. 2003) (avoiding the "ironic and unfair" "Catch-22" of *Williamson County*); *Front Royal & Warren County Indus. Park Corp.* v. *Town of Front Royal*, 135 F.3d 275, 283 (4th Cir. 1998); *Fields* v. *Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1303-1307 (11th Cir. 1992).

In *San Remo*, this Court disapproved these end-runs around the full faith and credit statute.[2] But in so doing it unleashed the full force of *Williamson County's* exhaustion rule. By completely shutting the preclusion trap on would-be federal takings plaintiffs, *San Remo* made clear to the four concurring Justices the need to revisit *Williamson County*. After *San Remo*, the "unanticipated effect of *Williamson County*" can no longer be avoided, so it is time to fix *Williamson County*.[3]

II. *Williamson County's* Exhaustion Requirement Does Not Warrant *Stare Decisis*.

"'*[S]tare decisis* is not an inexorable command.'" *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997) (quoting *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991)). It is strong when the settled question is one of statutory interpretation. *Leegin Creative Leather Prods.* v. *PSKS, Inc.*, 127 S. Ct. 2705, 2720 (2007). But *stare decisis* is less compelling when dealing with common-law style doctrines, *ibid.*, or constitutional prece-

---

[2] At least one circuit has already engaged in a new form of self-help, refusing to consider state litigation part of the procedures required by *Williamson County's* second prong. See *Asociación de Subscripción Conjunta del Seguro de Responsibilidad Obligatorio* v. *Flores Galarza*, 484 F.3d 1, 17 (1st Cir. 2007) ("In our view, such procedures do not include litigation of a state takings claim or any general remedial cause of action under state law"). *Flores Galarza* has created a split in the circuits on the matter. See *Peters* v. *Village of Clifton*, 498 F.3d 727, 733 n.6 (7th Cir. 2007).

[3] *San Remo's* majority offered reasons for keeping *Williamson County*, but did not disavow the wisdom of reconsideration. The majority merely concluded that "[w]hatever the merits of that concern may be, we are not free to disregard the full faith and credit statute." 545 U.S. at 347.

dents. *Agostini* v. *Felton*, 521 U.S. 203, 235 (1997). Regardless whether *Williamson County* is viewed as a constitutional decision or a prudential one developed through common law principles, twenty-three years of the failed *Williamson County* experiment have been enough.[4] *Cf. Khan*, 522 U.S. at 7 (overturning *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968), after 29 years); *Agostini*, 521 U.S. at 208-209 (overturning *Aguilar* v. *Felton*, 473 U.S. 402 (1985), after 12 years); *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 530-531 (1985) (overturning *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), after 9 years).

The considerations that guide this Court when deciding to overrule a prior precedent are well established. "'When governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent.'" *Seminole Tribe* v. *Florida*, 517 U.S. 44, 63 (1996) (quoting *Payne*, 501 U.S. at 827). In addition, the Court considers the extent that the prior precedent has been relied upon by the public in arranging daily life and business. *Leegin*, 127 S. Ct. at 2724. And the Court has "overruled * * * precedents when subsequent cases have undermined their doctrinal underpinnings." *Id.* at 2721 (quoting *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000)). All of these considerations argue for overturning *Williamson County*.

---

[4] The question whether the ripeness requirements of *Williamson County* are constitutional or prudential has been "conspicuously" left open and need not be resolved here. 545 U.S. at 351 n.2. Overruling is appropriate in either case.

A. *Williamson County's* Flawed Reasoning Has Resulted In A Scheme That Is Unworkable In Practice.

Chief Justice Rehnquist's *San Remo* concurrence observed that "real anomalies" are created by *Williamson County* that justify revisiting the decision. 545 U.S. at 351. In combination with full faith and credit principles, forced litigation of takings claims in state court denies the possibility of a subsequent federal forum, in contrast to Section 1983's provision of a federal forum for the vindication of other constitutional rights. The self-help employed by courts of appeals prior to *San Remo* to avoid the strictures of the exhaustion rule offers compelling evidence that *Williamson County* is unworkable in practice.

It is not surprising that *Williamson County* created a quagmire. *Williamson County* failed to consider the impact of preclusion. The Court clearly thought the claim at issue could eventually ripen and be heard in a federal forum. 473 U.S. at 194 ("the taking claim is not *yet* ripe"); *id.* at 195 ("the property owner cannot claim a violation * * * *until* it has used the procedure") (emphases added). "Reliance on the ripeness rationale [of *Williamson County*], unfortunately, suggests to property owners that their complaints will be ripe and heard in the federal courts after their state suits are over." Thomas Roberts, *Fifth Amendment Taking Claims in Federal Court: The State Compensation Requirement and Principles of Res Judicata*, 24 URB. LAW. 479, 480 (1992).

If the Takings Clause is really "as much a part of the Bill of Rights as the First Amendment or Fourth Amendment" and is not "a poor relation" of other rights, *Dolan*, 512 U.S. at 392, preclusion rules—as

reinforced by *San Remo*—leave *Williamson County's* exhaustion rule unworkable. As this Court described in *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972), "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law." *Williamson County*, in unintended consort with full faith and credit, takes the federal courts out of that guardian role in the case of federal just compensation rights.

With no briefing of the critical issues, *Williamson County* was not well or fully reasoned.[5] As the concurring Justices in *San Remo* pointed out, the two cases employed to create the state-litigation rule "provided limited support" for the position. 545 U.S. at 349 n.1. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984), is discussed in Part III below. The second case, *Parratt* v. *Taylor*, 451 U.S. 527 (1981), was acknowledged by the *Williamson County* Court as an "imperfect" analogy. 473 U.S. at 195 n.14.

Parratt, according to *Williamson County*, held that property deprivation by a state employee's unauthorized act did not present a Due Process claim unless the state failed to provide adequate postdeprivation process. 473 U.S. at 195. But the requirement of *post*deprivation process in *Parratt* resulted because *pre*deprivation process would be impossible,

---

[5] The state litigation requirement leading to the preclusion problem was not argued for by any of the twelve merits briefs in *Williamson County* with the exception of a single paragraph in the *Summary of Argument* section of the Solicitor General's amicus submission. See *Brief for the United States as Amicus Curiae Supporting Petitioners* at 10 (No. 84-4) (Nov. 15, 1984).

as unauthorized acts by state employees could not be anticipated with any regularity. In contrast, a taking virtually always occurs pursuant to established state policies or procedures that are foreseeable. See *id.* at 195 n.14. More important, a taking is complete after either the first prong of *Williamson County's* ripeness requirement is satisfied or, as here, a physical invasion has occurred. Therefore, unlike in *Parratt*, a violation does not need to be anticipated, rather it has already occurred. Additional postdeprivation process—in the form of state court litigation no less—is not required to ripen the constitutional violation. Neither logic, nor analogy to *Parratt*, supports *Williamson County's* second prong.

B. *Williamson County* Is Not Relied Upon By The Public.

No evidence suggests public reliance upon *Williamson County's* state litigation requirement. It is hard to fathom anyone relying upon a decision characterized in terms of its "*Alice in Wonderland* quality" and described as creating "a procedural morass, a labyrinth," a "quagmire," a "Kafkaesque maze, a fraud or hoax on landowners, a weapon of mass obstruction, and a Catch-22." Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 URB. LAW. 671, 702-703 (2004) (cataloguing courts' and commentators' characterizations of *Williamson County*). Rather, the fact that farmers like petitioner Peters and other property owners are still litigating in federal court and thus getting stuck in the *Williamson County* trap, combined with the courts of appeals' efforts to skirt *Williamson County*, suggest that there is widespread

dissatisfaction with and misunderstanding of *Williamson County*. Precedent is not due respect when it "creat[es] legal distinctions that operate as traps for the unwary." *Leegin*, 127 S. Ct. at 2723.

C. *Williamson County's* Doctrinal Underpinnings Have Eroded Away.

Where a precedent "has been widely criticized since its inception," as is the case here, this Court may properly reconsider it. *Khan*, 522 U.S. at 21. *San Remo* is not the only case to make *Williamson County* untenable.

In *City of Chicago* v. *Int'l College of Surgeons*, 522 U.S. 156, 163 (1997), this Court found removal to federal court appropriate for a federal takings claim, because under 28 U.S.C. § 1441(a), removal is proper when "the case originally could have been filed in federal court." But under *Williamson County*, such claims could not be filed in federal court, because they would not be ripe. The Eighth Circuit has since recognized the "anomalous * * * gap in Supreme Court jurisprudence" between *City of Chicago* and *Williamson County*, but observed that fixing that gap "is for the Supreme Court to say, not us." *Kottschade* v. *City of Rochester*, 319 F.3d 1038, 1041 (8th Cir. 2003).

Furthermore, by precluding federal takings claims, the *Williamson* trap effectively denies takings litigants the right to a jury trial guaranteed in *City of Monterey* v. *Del Monte Dunes*, 526 U.S. 687 (1999).

Finally, as already discussed, *Williamson County's* restrictions fly in the face of *Dolan*'s mandate that the Takings Clause not be treated as a sec-

ond-class right compared to others provided by the Bill of Rights.

III. *Williamson County's* Exhaustion Requirement Is Fundamentally Mistaken And Especially Harmful To Farmers And Ranchers.

A. The State Litigation Rule Is Illogical.

Williamson County essentially requires that state trial and appellate courts must have certified a local authority's denial of compensation in order to ripen a federal takings claim. Treating state courts and takings authorities as a monolith in this way undermines the separation of powers that makes state courts sufficiently neutral to arbitrate disputes between private litigants and local agencies. Consolidation of the two does not afford state courts the respect justified by the principles of comity espoused in *San Remo,* 545 U.S. at 345 (noting "weighty interests in * * * comity").

Applying *Williamson County's* logic to another government against which the Takings Clause applies—the federal government—illuminates its absurdity. If applied to a just compensation claim against the federal government, *Williamson County* would nonsensically allow the claim to ripen for federal court adjudication only *after* the federal court had already heard the claim and denied it. This chicken-egg circularity is dizzying.[6] The absurdity

---

[6] The *San Remo* concurrence observed that some state courts have applied a similar analogy to find the state-litigation requirement precludes them from hearing federal takings claims. These state courts reason that they must abide by the state-litigation requirement before the federal takings claim can ripen in their own court. 545 U.S. at 351 n.2.

may explain why the Court has *not* required state litigation prior to ripening any other § 1983 claim. See, *e.g.*, *Monroe* v. *Pape*, 365 U.S. 167, 183 (1961) ("It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked").

To be sure, *Williamson County* asserted that the same rule *does* apply against the federal government: "we have held that taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U.S.C. § 1491." 473 U.S. at 195 (citing *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984)). But that is plainly incorrect. The Tucker Act permits claims for just compensation from the federal government in the same manner that § 1983 provides for such claims against a local entity acting under color of state law. But the Tucker Act does not establish a prerequisite to bringing a just compensation claim in federal court: that would make it a prerequisite to itself. Every Tucker Act decision before and since *Williamson County*, including the *Monsanto* case cited in *Williamson County*, merely held that a just compensation claim was a prerequisite to enjoining federal actions or striking down federal provisions as unconstitutional under the Takings Clause. See, *e.g.*, *Preseault* v. *Interstate Commerce Comm'n*, 494 U.S. 1 (1990); *Monsanto*, 467 U.S. 986; *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974). Peters seeks to do nothing more than *Monsanto* allowed in the Tucker Act context: to bring his just compensation claim in federal court.

This Court has recognized that "[t]here are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims." *England* v. *Louisiana Bd. of Medical Examiners*, 375 U.S. 411, 415 (1964). To remedy those objections, the answer is not to ignore the full faith and credit statute as courts of appeals did prior to *San Remo*, but to eliminate *Williamson County's* state-litigation requirement.

B. Farmers And Ranchers Are Particularly Harmed By *Williamson County*.

"Considerations of fairness and justice" should be considered in takings jurisprudence. *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U.S. 302, 333 (2002). Farmers and ranchers are increasingly burdened by *Williamson County* as the expanding rural-urban interface leads to conflicts between growing municipalities and the agricultural lands once on the outskirts of town, as here. Between 1992 and 2001, when over 20 million acres of land were developed, half of those acres were agricultural lands. NATURAL RESOURCES CONSERVATION SERVICE, NATIONAL RESOURCES INVENTORY 2001 ANNUAL NRI: URBANIZATION AND DEVELOPMENT OF RURAL LAND (2001) (available at http://www.nrcs.usda.gov/technical/land/nri01).

The Framers would have understood protecting the rights of farmers and ranchers from encroaching suburbia. For them, "[p]lacing legal boundaries around issues such as property rights" isolated "these issues from popular tampering, partisan de-

bate, and the clashes of interest-group politics. Some things, including the power to define property and interpret constitutions, became matters not of political interest to be determined by legislatures but of the 'fixed principles' of law to be determined only by judges." GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 324-325 (First Vintage Books ed. 1993). In states where judges are elected, the absence of a federal forum leaves farmers and ranchers to the will of the popular tampering that property rights were meant to protect.

Farmers and ranchers are already disadvantaged in a legal system where agriculture's dirt rich, dollar poor nature leaves many without the liquidity to engage in lengthy legal battles. See Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 43 (1995) ("Practically speaking, the universe of plaintiffs with the financial ability to survive the lengthy ripening process is small"). And in more rural communities, where farmlands are worth less and farmers may be not only dollar poor, but also land poor, the litigation costs of seeking just compensation often exceed the value of the property. *Williamson County's* removal of the threat of federal court review of a takings claim exacerbates the problem, making it harder for farmers and ranchers to vindicate their rights in a cost efficient and effective manner.

Nor is the loss to farmers and ranchers of viable federal takings claims costless to society. As this case illustrates, the loss of farmland to encroaching development activities like those of respondents all too readily may occur. The loss of productive farmland has the potential to impact the provision of affordable food and other agricultural commodities. And

the environmental impacts of encroachments on vulnerable agricultural land at the rural-urban interface are staggering. See, *e.g.*, RALPH E. HEIMLICH & WILLIAM D. ANDERSON, U.S. DEP'T OF AGRIC., DEVELOPMENT AT THE URBAN FRINGE AND BEYOND: IMPACTS ON AGRICULTURE AND RURAL LAND 33 (2001); J. BISHOP GREWELL & CLAY J. LANDRY, ECOLOGICAL AGRARIAN: AGRICULTURE'S FIRST EVOLUTION IN 10,000 YEARS 92 (2003) ("Three-quarters of the wildlife in the U.S. live on farm and ranch lands").

If farmers and ranchers cannot defend their land from physical invasions as outrageous as those alleged by petitioner Peters by wielding the threat of a federal just compensation suit, all the benefits to our Nation of such land are at risk. This Court should grant certiorari in this case and overrule *Williamson County's* state litigation rule to restore Fifth Amendment rights that otherwise will be effectively meaningless.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JULIE ANNA POTTS
General Counsel
DANIELLE QUIST
American Farm Bureau Federation
600 Maryland Ave., SW
Washington, D.C. 20024
(202) 406-3616

TIMOTHY S. BISHOP
Counsel of Record
J. BISHOP GREWELL
Mayer Brown LLP
71 South Wacker Dr.
Chicago, IL 60606
(312) 782-0600

Counsel for Amicus Curiae

DECEMBER 2007

77

MOTION FILED

DEC 17 2007

(5)

No. 07 - 635

In the
Supreme Court of the United States

BRUCE PETERS,
Petitioner,
v.
VILLAGE OF CLIFTON, an Illinois municipal corporation; ALEXANDER, COX & MCTAGGERT, INC.; and JOSEPH MCTAGGERT,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Seventh Circuit

---

MOTION FOR LEAVE TO FILE AND BRIEF OF AMICUS CURIAE THE COALITION FOR PROPERTY RIGHTS IN SUPPORT OF PETITIONER BRUCE PETERS

Counsel for Amicus Curiae

*NICOLE E. GRANQUIST
Counsel of Record
RHONDA CATE CANBY
GREGORY T. BRODERICK
Of Counsel
DOWNEY BRAND LLP
555 Capitol Mall, 10th Floor
Sacramento, CA 95814
Telephone: (916) 444-1000
Facsimile : (916) 444-2100

No. 07 - 635

In the
Supreme Court of the United States
October Term, 2007

BRUCE PETERS,
Petitioner,
v.
VILLAGE OF CLIFTON, *et al.*,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Seventh Circuit

---

MOTION OF AMICUS CURIAE THE COALITION FOR PROPERTY RIGHTS FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER

Counsel for Amicus Curiae

*NICOLE E. GRANQUIST
Counsel of Record
RHONDA CATE CANBY
GREGORY T. BRODERICK
Of Counsel
DOWNEY BRAND LLP
555 Capitol Mall, 10th Floor
Sacramento, CA 95814
Telephone: (916) 444-1000
Facsimile : (916) 444-2100

Pursuant to Supreme Court Rule 37.2(a), counsel for Amicus Curiae The Coalition for Property Rights ("Coalition") has attempted to secure written consent for the filing of the attached Brief of Amicus Curiae from counsel for the Petitioner and Respondents.[1] Although counsel for Petitioner granted such consent, counsel for Respondents refused to the request of Amicus for written consent pursuant to Supreme Court Rule 37.2(a).2 Accordingly, counsel for Amicus Curiae hereby moves this Court pursuant to Supreme Court Rule 37.2(b) for leave to file the Brief of Amicus Curiae which is submitted herewith.

The Coalition for Property Rights is a public policy, education, and advocacy organization based in Orlando, Florida, which was founded in 2001 to give property owners and property rights a stronger voice. Its mission is to educate the public, elected officials,

---

1 Pursuant to Supreme Court Rule 37.6, counsel for Amicus states that no counsel for a party authored the accompanying Brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the accompanying Brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the Brief's preparation or submission. Pursuant to Supreme Court Rule 37.2(a), counsel for Amicus states that Counsel of Record for all parties received notice at least ten days prior to the due date of Amicus Curiae's intention to file this Brief.

2 The written consent of Counsel for Petitioners to the submission of the all amicus curiae briefs pursuant to Supreme Court Rule 37.2(a) was lodged with the Clerk of this Court on November 30, 2007. On December 7, 2007, Amicus Coalition contacted James C. Kearns, Esq., counsel for the Respondents, and requested written consent for Amicus to submit the accompanying Brief pursuant to Supreme Court Rule 37.2(a). Counsel for the Respondents indicated by email on December 10, 2007, that he would not consent to the filing of this Brief.

and the courts on the importance of American property rights and to defend these rights from further erosion. The Coalition believes that property rights provide the foundation for individual freedom and economic opportunity and are absolutely vital to economic prosperity.

The Coalition believes that excessive government regulation restricts the creative and constructive use of property, impedes the ability of property owners to respond to free market demands, and ultimately, impedes the ability of average people to realize the American dream. The Coalition draws its membership from a broad cross-section of society, which includes homeowners, land owners, attorneys, real estate professionals, bankers, engineers, architects, accountants, appraisers, farmers, ranchers, builders, manufacturers, business leaders, retirees and even non-landowners.

Central to these rights in private property is a forum in which those rights can be vindicated. But victims of excessive state and local regulations have been effectively barred from federal court in the two decades since this Court's decision in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985). As such, property owners cannot effectively vindicate their Constitutionally guaranteed rights in local courts, which can often be the subject of electoral, political, or other pressures. Instead, property owners should have a federal forum to protect federally guaranteed rights, and the analysis provided in the attached brief will aid this Court in the consideration of this matter.

Wherefore, the Coalition respectfully requests that this Court grant Amicus Curiae leave to file the accompanying Brief in support of the Petition for a Writ of Certiorari.

Respectfully submitted,

DOWNEY BRAND LLP

*NICOLE E. GRANQUIST
Counsel of Record
DOWNEY BRAND LLP
555 Capitol Mall, 10th Floor
Sacramento, CA 95814
Telephone: (916) 444-1000
Facsimile : (916) 444-2100

QUESTIONS PRESENTED

1. Should the Court overrule *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* to the extent it requires property owners to seek compensation in state courts to ripen a federal takings claim, where four Justices of this Court recognized in *San Remo Hotel v. City and County of San Francisco* that such a rule lacks any legitimate doctrinal basis and causes tremendous and unintended jurisdictional confusion?

2. Is a claim against a traditional physical taking—occurring without any contemporaneous provision of compensation—subject to Williamson County's state procedures ripeness rule, where that rule was articulated in the regulatory takings context, and effectively strips the federal courts of any role in the development of physical takings law?

TABLE OF CONTENTS

MOTION OF AMICUS CURIAE FOR LEAVE TO FILE BRIEF i

QUESTION PRESENTED v

TABLE OF CONTENTS vi

TABLE OF AUTHORITIES vii

INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. *Williamson County* Has Produced Jurisprudential Chaos in the Lower Federal Courts 4

A. Federal Courts are Divided Over Whether *Williamson County's* State-Litigation Requirement Is A Prudential Rule Or Is Based in Article III 5

B. Even Courts Agreeing That *Williamson County* Is Prudential Cannot Agree When to Apply It 7

C. Even When *Williamson County* Applies, the Circuits Cannot Agree When Its Has Been Satisfied 10

II. Property Owners Like Mr. Peters Deserve A Federal Forum in Which to Vindicate Their Federally Protected Rights 14

CONCLUSION 17

TABLE OF AUTHORITIES

CASES

Armendariz v. Penman, 75 F.3d 1311 (9th Cir.1996) 8

Asociación de Subscripción Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza, 484 F.3d 1, 6 (1st Cir. 2007) 5,8,11

Bauknight v. Monroe County, Fla., 446 F.3d 1327, 1331 (11th Cir. 2006) 6

Beverly Boulevard LLC v. City of West Hollywood, 238 Fed.Appx. 210 (9th Cir. 2007) 5,6

Compare Peduto v. City of N. Wildwood, 878 F.2d 725 (3d Cir. 1989) 12

County Concrete Corp. v. Town of Roxbury, 442 F.3d 159, 169 (3d Cir. 2006) 9

Crown Point Development, Inc. v. City of Sun Valley, 506 F.3d 851 (9th Cir. 2007). 8

DBSI/TRI IV Ltd. Partnership v. United States, 465 F.3d 1031, 1037-38 (9th Cir. 2006) 6

DLX, Inc. v. Kentucky, 381 F.3d 511 (6th Cir. 2004) 12

Dodd v. Hood River County, 59 F.3d 852 (9th Cir. 1995). 12

Dougherty v. Town of No. Hempstead Bd. of Zoning App., 282 F.3d 83, 88 (2d Cir. 2002) 9

Forseth v. Vill. of Sussex, 199 F.3d 363, 370-71 (7th Cir. 2000) 9

CASES CONT.

Florida Ass'n of Rehab. Facilities, Inc. v. Florida Dep't of Health and Rehab. Serv., 225 F.3d 1208, 1227 n.14 (11th Cir. 2000).....6

Johnson v. City of Shorewood, Minnesota, 360 F.3d 810, 820 (8th Cir. 2004) 12

Koscielski v. City of Minneapolis, 435 F.3d 898, 903 (8th Cir. 2006) 6

Landgate, Inc. v. California Coastal Com'n, 17 Cal.4th 1006, 1013-14; 73 Cal.Rptr.2d 841 (Cal. 1998)..15

Levald, Inc. v. City of Palm Desert, 998 F.2d 680, 692 (9th Cir. 1993) 12

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 2005) 8

Ochoa Realty Corp. v. Faria, 815 F.2d 812, 817 n.4 (1st Cir. 1987) 9

Peters v. Village of Clifton, 498 F.3d 727, 734 (7th Cir. 2007) 5,8,11,14

San Remo Hotel v. City and County of San Francisco, 545 U.S. 323, 348 (2005) 4,5,10

Tri County Indus., Inc. v. District of Columbia, 104 F.3d 455, 459 (D.C.Cir.1997) 8

Villas of Lake Jackson, Ltd. v. Leon County, 121 F.3d 610, 611 (11th Cir. 1997) 9

Washlefske v. Winston, 234 F.3d 179, 182 (4th Cir. 2000) 5

TABLE OF AUTHORITIES

CASES

Weinberg v. Whatcom County, 241 F.3d 746, 752 n.4 (9th Cir. 2001) 5

Wilkinson v. Pitkin County Bd., 142 F.3d 1319 (10th Cir. 1998) 12

Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194 (1985) 3,4,5,6,7,8,9,10,11,12,13,14,16

Yamagiwa, et al., v. City of Half Moon Bay, et al., (N.D. Cal Docket No. C 05-4149 VRW) 6,12,15

CONSTITUTION, STATUTES, AND ORDINANCES

Supreme Court Rule 37.2(a) 1

Supreme Court Rule 37.2(b) 2

Supreme Court Rule 37.6..... 1

28 U.S.C. Section 1367 12

California Code of Civil Procedure Section1085 or 1094.5 15

California Code of Civil Procedure Section 1094.5 15

MISCELLANEOUS

San Mateo Daily Journal, *City loses $36M lawsuit*, http://www.smdailyjournal.com/article_preview.php?id=83957 (last visited December 13, 2007) 16

No. 07 - 635

In the
Supreme Court of the United States
October Term, 2007

BRUCE PETERS,
Petitioner,
v.
VILLAGE OF CLIFTON, ILLINOIS *et al.*,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the
Seventh Circuit

BRIEF OF AMICUS CURIAE THE COALITION FOR PROPERTY RIGHTS IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

Amicus Curiae The Coalition For Property Rights ("Coalition") seeks to bring to the Court's attention its views, and those of its members, concerning the vital need for a federal forum in which individual property owners can vindicate their federally protected right to just compensation under the Fifth Amendment to the United States Constitution.[1]

---

1 Pursuant to Supreme Court Rule 37.6, counsel for Amicus states that no counsel for a party authored this Brief in whole or in part, and no counsel or party made a monetary

The Coalition for Property Rights is a public policy, education, and advocacy organization based in Orlando, Florida, which was founded in 2001 to give property owners and property rights a stronger voice. Its mission is to educate the public, elected officials, and the courts on the importance of American property rights and to defend these rights from further erosion. The Coalition believes that property rights provide the foundation for individual freedom and economic opportunity and are absolutely vital to economic prosperity.

The Coalition believes that excessive government regulation restricts the creative and constructive use of property, impedes the ability of property owners to respond to free market demands, and ultimately, impedes the ability of average people to realize the American dream. The Coalition draws its membership from a broad cross-section of society, which includes homeowners, land owners, attorneys, real estate professionals, bankers, engineers, architects, accountants, appraisers, farmers, ranchers, builders, manufacturers, business leaders, retirees and even non-landowners.

---

contribution intended to fund the preparation or submission of this Brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the Brief's preparation or submission. Pursuant to Supreme Court Rule 37.2(a), counsel for *Amicus* states that Counsel of Record for all parties received notice of Amicus Curiae's intention to file this Brief at least ten days prior to the due date. Counsel for Petitioner consented to the filing of this Brief in a "blanket consent" lodged with this Court November 30, 2007, while counsel for Respondent withheld consent. Pursuant to Supreme Court Rule 37.2(b), counsel for Amicus Curiae moved for leave to file this Brief, which motion is bound together with this Brief.

Central to these rights in private property is a forum in which those rights can be vindicated. But victims of excessive state and local regulations have been effectively barred from federal court in the two decades since this Court's decision in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985). As such, property owners cannot effectively vindicate their Constitutionally guaranteed rights in local courts, which can often be the subject of electoral, political, or other pressures. Property owners should have a federal forum to protect federally guaranteed rights, and the analysis provided in the attached brief will aid this Court in the consideration of whether to grant the petition for certiorari.

STATEMENT OF THE CASE

Amicus Curiae adopts the Statement of the Case contained in the Brief of Petitioner Bruce Peters.

SUMMARY OF ARGUMENT

This Court's decision in *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) has been the subject of much confusion in the lower federal courts. There is sharp disagreement on whether *Williamson County* presents a mandatory ripeness rule or an optional prudential rule, whether it applies to all takings claims or only to regulatory takings claims, and whether it applies to other constitutional claims involving government harm to property. *Williamson County* also inequitably bars property owners from vindicating their federally protected rights in federal court—a burden not

placed on any other constitutional or statutory right. This case presents the Court with an opportunity to solve all of these problems in one fell swoop by accepting Chief Justice Rehnquist's suggestion to reexamine *Williamson County*. *See San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323, 348 (2005) (Rehnquist, C.J. concurring).

ARGUMENT

I. *Williamson County* Has Produced Jurisprudential Chaos in the Lower Federal Courts

As has been well documented by petitioner and other amici, *Williamson County* is of dubious textual parentage and rests on the equivalent of jurisprudential quicksand. This brief thus focuses not on the historical merits of the *Williamson County* "state litigation" ripeness rule, but rather on the practical disaster that has resulted in the short 22 years since its creation. While it was perhaps an admirable idea in the abstract, forcing property owners to "ripen" their federal takings claims by first litigating identical, state-based claims in state court, the rule has raised far more issues than it resolved. The result has been conflicts among the federal circuit courts of appeals and state supreme courts, a labyrinthine maze of procedures for property owners, and endless petitions to this Court to sort out the countless details in the Rube Goldberg scheme[2] that

---

2 *See* http://www.rube-goldberg.com/. According to Merriem-Webster's Online Dictionary, a Rube Goldberg scheme involves "accomplishing by complex means what seemingly could be

now makes up federal takings litigation. This Court should overrule *Williamson County* as suggested by the four-justice concurrence in *San Remo*. *See San Remo Hotel v. City and County of San Francisco*, 545 U.S. at 348.

A. Federal Courts are Divided Over Whether *Williamson County's* State-Litigation Requirement Is A Prudential Rule Or Is Based in Article III

Many Circuit Courts of Appeals consider *Williamson County's* state procedures rule to be "prudential," meaning that it can be waived by the government defendant or that the Court could simply decline to apply it in appropriate circumstances. *See*, e.g., *Peters v. Village of Clifton*, 498 F.3d 727, 734 (7th Cir. 2007) ("*Williamson County's* ripeness requirements are prudential in nature"); *see also Asociación de Subscripción Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 6 (1st Cir. 2007) ("For multiple reasons, the *Williamson County* prudential ripeness concerns are inapposite here"); *Washlefske v. Winston*, 234 F.3d 179, 182 (4th Cir. 2000); *Beverly Boulevard LLC v. City of West Hollywood*, 238 Fed.Appx. 210 (9th Cir. 2007) ("Williamson sets forth a prudential rule, and we may therefore assume without deciding that the takings claims are ripe in order to reject them on the merits.") (citing *Weinberg v. Whatcom County*, 241 F.3d 746, 752 n.4 (9th Cir. 2001)). Other Courts have decided that *Williamson County* is a matter of

---

done simply."

Article III ripeness, which, when unsatisfied, bars the Court from hearing the case under almost all circumstance. *See*, e.g., *Koscielski v. City of Minneapolis*, 435 F.3d 898, 903 (8th Cir. 2006) (declaring that *Williamson County* ripeness defense could not be waived because that "would require the Court to refuse to consider whether it has subject matter jurisdiction over the case" and collecting cases); *see also Bauknight v. Monroe County, Fla.*, 446 F.3d 1327, 1331 (11th Cir. 2006) (noting, in a takings case, that "Ripeness is an issue of subject matter jurisdiction.").

The distinction between prudential ripeness and Article III ripeness is, of course, critical.[3] As the Eighth Circuit correctly notes, Article III problems with a case go to the power of the Court to hear the case, and can almost never be waived. Article III ripeness, for example, may be raised for the first time on appeal, or even before this Court. *See*, e.g., *DBSI/TRI IV Ltd. Partnership v. United States*, 465 F.3d 1031, 1037-38 (9th Cir. 2006); *see also Florida Ass'n of Rehab. Facilities, Inc. v. Florida Dep't of Health and Rehab. Serv.*, 225 F.3d 1208, 1227 n.14 (11th Cir. 2000).

The significance of the Article III/prudential distinction is demonstrated in a recent order of the United States District Court for the Northern District of California. In *Yamagiwa, et al., v. City of*

---

3 Petitioner's brief amply demonstrates the "removal" trap, which amici will not discuss. *See* Pet. Br. at 21-24.

Half Moon Bay, et al., (N.D. Cal Docket No. C 05-4149 VRW), the defendant city removed the plaintiff landowner's case to federal district court under 28 U.S.C. § 1331 due to the presence of a Fifth Amendment takings claim in the Complaint. *See Yamagiwa* at ¶ 368. After significant discovery, including 47 depositions, nine experts, and a bench trial, but prior to the verdict, the defendant city moved the district court to remand the case to state court based on *Williamson County*. *See id.* at ¶ 367. Holding that *Williamson County* was merely a prudential doctrine measuring whether the issues were "fit for judicial decision," *id.* at ¶ 364, the district court deemed the prudential requirements satisfied and proceeded to judgment. The result: A $36,750,000 judgment for the property owner. Had the Half Moon Bay case been in the Northern District of Iowa instead of the Northern District of California, the Court would have been compelled to dismiss the case or, at best, remand it to state court, permitting the City to "take its chips off the table because it didn't like the dealer's hand." Id. at ¶ 368.

Given the inequity of these differing rules for vindicating Fifth Amendment rights caused by the circuit split, this Court will surely be assailed with petitions to resolve this important question—a question which would not need resolving if *Williamson County* were overruled.

B. Even Courts Agreeing That *Williamson County* Is Prudential Cannot Agree When to Apply It.

Even if this Court eventually solves the Article III/prudential debate, it will find itself mired in petitions seeking to resolve the Circuit split over when prudence requires application of the rule and when it does not. A recent decision of the First Circuit, for example, declared that *Williamson County* was only applicable to *regulatory* takings—not the kind of physical takings at issue in that case and in this case. *Flores Galarza,* 484 F.3d at 15. But five months later, the Seventh Circuit expressly rejected *Flores Galarza* and strongly suggested that *Williamson County's* procedures apply to all takings cases. *Peters v. Village of Clifton*, 498 F.3d at n.6.

The Ninth Circuit has held that the Fifth Amendment's takings clause subsumes or "preempts" substantive due process claims. *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir.1996) (en banc).[4] That is, a due process claim involving harm to property of any kind is subjected to *Williamson County*, even if no takings claim is alleged and even if no takings claim could succeed. *Armendariz*, 75 F.3d at 1324 n.9 & 1325.

Other Circuits have rejected the Ninth Circuit's approach. *See*, e.g., *Tri County Indus., Inc. v. District of Columbia*, 104 F.3d 455, 459 (D.C.Cir.1997) ("[T]he requirements of the takings

---

4 Based on this Court's decision in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), the Ninth Circuit recently held "that *Armendariz* has been undermined to the limited extent that a claim for wholly illegitimate land use regulation is not foreclosed." *Crown Point Development, Inc. v. City of Sun Valley*, 506 F.3d 851 (9th Cir. 2007).

clause cannot be said to exhaust the Fifth Amendment's substantive protection of property rights from government imposition."). Some circuits have continued to analyze the different challenges (takings, substantive due process, equal protection, etc.) separately without discussion of *Williamson County*. *See*, e.g., *Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610, 611 (11th Cir. 1997) (determining that there is no independent "substantive due process taking" cause of action and separately analyzing the plaintiff's takings, substantive due process, and equal protection claims).

Some circuits have explicitly limited *Williamson County* to takings claims. *See*, e.g., *County Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 169 (3d Cir. 2006) ("[G]iven that the 'exhaustion of just compensation procedures' requirement only exists due to the 'special nature of the Just Compensation Clause,' it is inapplicable to appellants' facial [substantive due process] and [equal protection] claims" (citations omitted)). Others have held that *Williamson County* applies to substantive due process and takings claims but not equal protection claims. *See*, e.g., *Forseth v. Vill. of Sussex*, 199 F.3d 363, 370-71 (7th Cir. 2000). *See Ochoa Realty Corp. v. Faria*, 815 F.2d 812, 817 n.4 (1st Cir. 1987). And still others extend *Williamson County* to takings, substantive due process, and equal protection claims. *See Dougherty v. Town of No. Hempstead Bd. of Zoning App.*, 282 F.3d 83, 88 (2d Cir. 2002).

These inconsistent approaches to takings

jurisprudence are creating ever-expanding confusion in the district and circuit court; overruling *Williamson County* would resolve that confusion but, short of that, further direction from this Court on the scope of *Williamson County's* application will be necessary.

C. Even When *Williamson County* Applies, the Circuits Cannot Agree When Its Has Been Satisfied.

Even if this Court resolved the questions above—

> (a) whether *Williamson County* is a prudential doctrine or a mandatory, Article III requirement;
> (b) to which claims do the *Williamson County* procedures apply (takings, due process, etc); and
> (c) to which kind of takings do the *Williamson County* procedures apply (regulatory vs. physical, facial vs. as applied, etc.)

—there is still the difficult task of figuring out *how* to apply it. Chief Justice Rehnquist's concurrence in *San Remo* pointed out that the Court has referred to *Williamson County* as a "prudential" requirement, though he also noted that the question was still open. 545 U.S. at 349 & 350 n.2. Assuming that it *is* a procedural requirement, the lower federal courts are likely to find themselves spending a fair amount of time trying to sort out just when *Williamson County* has been satisfied.

Recent case law suggests that the federal

courts are unlikely to agree. Leaving aside the courts holding that *Williamson County* is a mandatory Article III doctrine, even the "prudential" courts have developed sharp disagreements. The First Circuit, for example, has determined that *Williamson County*'s procedures does not include litigation at all:

> In our view, such procedures do not include litigation of a state takings claim or any general remedial cause of action under state law. Rather, the Supreme Court must have had in mind only those procedures specifically designed by the state to avoid constitutional injury in the first instance by providing a means for a plaintiff to obtain compensation for the government's taking of property. *Flores Galarza*, 484 F.3d at 17.

Thus, it seems, the First Circuit is willing to hear takings claims so long as all administrative avenues of relief have been cut off. Not so in the Seventh Circuit. While explicitly recognizing *Williamson County* as a prudential doctrine, the Court below in this case explained that it was not "free to disregard" the requirements and that "this court is bound to follow" them. *Peters*, 498 F.3d at 734; *see also id.* at (rejecting *Flores Galarza*, 484 F.3d at 17). Evidently the rule in the Seventh Circuit is that Williamson is a prudential doctrine, but prudence has no place in its application. The Northern District of California has taken a "middle of the road" approach, deeming

Williamson County satisfied so long as the matter is "fit for judicial decision." See *Yamagiwa*, supra, at ¶ 364. It may well be that none of these approaches is correct, and that some other test is required. But all that will have to be worked out in the lower federal courts, no doubt with this Court's repeated intervention.

In addition to the above, there are countless other disputes awaiting this Court if it does not put *Williamson County* out of its misery. The Court may be asked to decide whether *Williamson County* prohibits pendent jurisdiction over a state court takings claim if there is another valid federal claim under 28 U.S.C. § 1367. *See*, e.g., *Johnson v. City of Shorewood, Minnesota*, 360 F.3d 810, 820 (8th Cir. 2004) (suggesting that decision to dismiss state takings claims after dismissing all federal claims was discretionary); *see also Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 692 (9th Cir. 1993) (same). Or the Court may be asked to resolve the dispute over whether litigating a state takings claim results in claim preclusion or mere issue preclusion. *Compare Peduto v. City of N. Wildwood*, 878 F.2d 725 (3d Cir. 1989) and *Wilkinson v. Pitkin County Bd.*, 142 F.3d 1319 (10th Cir. 1998) *with DLX, Inc. v. Kentucky*, 381 F.3d 511 (6th Cir. 2004) and *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995).

This Court's decision in *Williamson County* threatens to leave the federal courts a thicket of procedural questions, further stretching their already limited resources. Property owners are

presently condemned to procedural purgatory, never getting a full and fair adjudication of their claims. These procedural hurdles also have a "chilling effect"—it might be worth the expense and rigors of litigation for a $36 million claim, but not for a $100,000 claim. The Coalition often finds itself standing beside small property owners who are outnumbered and outgunned by government lawyers and "community advocates" pushing for greater regulation. The Court should remove the *Williamson County* entry barriers, and allow federal courts to act as guardians of these federally protected rights.

Once the underlying taking is complete and compensation is not paid, a federal takings claim is ripe. Any attempt to avoid this straight-forward reading of the Fifth Amendment leads to the chaos and jurisprudential train-wreck evident in the past 22 years. This Court should solve the problem by accepting the late-Chief Justice's invitation to overrule *Williamson County* and permit property owners to file their federal takings claims in federal court.

II. Property Owners Like Mr. Peters Deserve A Federal Forum in Which to Vindicate Their Federally Protected Rights

"It seems scarcely to admit of controversy," Alexander Hamilton wrote in Federalist 81, "that the judiciary authority of the United States ought to extend to . . . all those [cases] which concern the execution of the provisions expressly contained in" the Constitution. The Fifth Amendment expressly and rather prominently places protection of private property at the very heart of the Constitution. But the intersection of *Williamson County* and *San* Remo has inadvertently consigned virtually all takings claims to the state court. This is unfair to property owners who merely seek their day in federal court to protect their federal rights.

Mr. Peters seeks only to vindicate his right to exclude government from using his property for sewage overflow. As recognized by the Court below, there does not appear to be a ready procedure in the Illinois courts for Mr. Peters to seek compensation. But the 7th Circuit still ordered Mr. Peters to state court because there was no "explicit authority from the Illinois courts" stating that "no state remedy was available for takings." *Peters*, 498 F.3d 729. That is, Mr. Peters and other property owners are required to prove the negative by litigating for years in state court before any federal court will consider their claims.

California property owners face an even worse procedural whipsaw. Property owners wrongly denied a permit which results in a taking cannot sue immediately for compensation in state court.

Rather, they must challenge the decision with an administrative writ under California Code of Civil Procedure §§ 1085 or 1094.5. Assuming that the permit was wrongly denied, the state trial courts will order the local agency to grant the permit, ending any permanent takings claim. *See Landgate, Inc. v. California Coastal Com'n*, 17 Cal.4th 1006, 1013-14; 73 Cal.Rptr.2d 841 (Cal. 1998). Under this Court's decisions, property owners should be able to bring a temporary takings claim for the several years during which the owners had no use of their properties. But California has decided that litigation over the validity of the government's action is merely a "normal part of the regulatory process" and thus exempt from any takings claim. *Id.* at 1031. As such, it is virtually impossible for a landowner to obtain compensation for a taking of private property. At most, property owners may get the use of their property back, but only after years of expensive litigation and with no compensation for the intervening loss.

Resort to federal court is also important given the life tenure of federal judges. Unlike many elected state judges[5] who may be "too little independent" as recognized in Federalist 81, life-tenured federal judges may decide cases free from local pressures. In the recent *Yamagiwa* decision from the Northern District of California, the Court found a taking and awarded $36.75 million for the taking of private property—an amount within the range of both the City's and plaintiff's experts. But

---

5 California's Superior Court (trial) judges run in non-partisan elections.

this award is more than triple the annual budget of the City, and press accounts report that the City has held "closed door" meetings with all employees to discuss matters such as job security, and has hinted that the ruling may cause the City to go bankrupt. *See* San Mateo Daily Journal, *City loses $36M lawsuit*, http://www.smdailyjournal. com/article_ preview.php?id=83957 (last visited December 13, 2007). The district judge was no doubt aware of the economic impact of his decision, but followed the law as required. And though much-maligned in those same press accounts, the district judge is insulated from pressure or influence by life tenure.

As Hamilton put it in Federalist 78, the "inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission." An elected California Superior Court judge, however, would certainly have felt intense pressure and would likely have faced electoral consequences for making the right decision. A federal forum frees the life-tenured judge from such concerns, and provides the property owner and the public with assurance of a full and fair hearing dedicated to reaching the just result.

In light of the above, property owner owners like Mr. Peters and the members of Amicus Coalition For Property Rights deserve their day in federal court. As such, this Court should grant Mr. Peters' petition and accept Chief Justice Rehnquist's suggestion to reexamine *Williamson County*.

Conclusion

For the foregoing reasons, this Court should grant Mr. Peters' petition for a writ of certiorari.

Respectfully submitted,
DOWNEY BRAND LLP

Nicole E. Granquist
Counsel for Amicus Curiae
Coalition for Property Rights

77 MOTION FILED
DEC 17 2007

(2)

No. 07-635

In the Supreme Court of the United States

BRUCE PETERS

Petitioner

v.

VILLAGE OF CLIFTON, ILLINOIS, ET AL.

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE FOR ELIZABETH J. NEUMONT (AND ALL OTHERS SIMILARLY SITUATED) IN SUPPORT OF PETITIONER

HAROLD E. WOLFE, JR.
HAROLD E. WOLFE, JR., P.A.
Suite 302, Executive Centre
2300 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
(561) 697-4100

ERIC GRANT
Counsel of Record
ATTORNEY AT LAW
Suite 100
8001 Folsom Boulevard
Sacramento, CA 95826
(916) 388-0833

Counsel for Amici Curiae

QUESTION PRESENTED

This brief will address the first question presented by the petition, namely:

Whether the "state procedures" aspect of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-97 (1985), which mandates that property owners exhaust state judicial remedies before pursuing federal claims for just compensation in federal court, should be overruled.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE 1

INTRODUCTION 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. In Creating the State Procedures Requirement, *Williamson County* Deviated Sharply from the Established Understanding of the Just Compensation Clause 4

A. At Issue Here Is the Right to Recover Just Compensation for Takings of Private Property for Public Use 4

B. It Was Always the Law that the Right to Recover Just Compensation Accrues at the Time of the Taking 5

II. In Creating the State Procedures Requirement, *Williamson County* Built a House on Jurisprudential Sand 7

A. The Requirement Was Fabricated Without Benefit of Serious Briefing or Argument 8

B. The Requirement Rests Principally on Two Flawed Analogies to Inapposite Decisions 9

1. *Ruckelshaus v. Monsanto Co.* 10

2. *Parratt v. Taylor* 12

C. The Requirement Finds No Support in the Principle that the Amendment Proscribes Only Takings *Without Just Compensation* 14

TABLE OF CONTENTS—Continued

Page

III. The State Procedures Requirement Has Other Defects that Show Its Doctrinal Incoherence 15

A. The Requirement Is Inconsistent with the No-Exhaustion-of-Remedies Rule Governing Other Federal Rights 15

B. The Requirement Is in Practice Ignored by State Courts and by this Court 17

C. The Requirement Invites Disrespect for State Courts by Treating Them as Mere Stations on the Road to Federal Court 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page

Cases

Armstrong v. United States,
364 U.S. 40 (1960) 5

Dolan v. City of Tigard,
512 U.S. 374 (1994) 16

Eide v. Sarasota County,
908 F.2d 716 (11th Cir. 1990),
cert. denied, 498 U.S. 1120 (1991) 21

First English Evangelical Lutheran Church v. County of Los Angeles,
482 U.S. 304 (1987) 5, 8, 13

Grubb v. Public Utilities Commission,
281 U.S. 470 (1930) 20

Hudson v. Palmer,
468 U.S. 517 (1984) 12

Jacobs v. United States,
290 U.S. 13 (1933) 5

Jacobs Wind Electric Co., Inc. v. Department of Transportation,
626 So. 2d 1333 (Fla. 1993) 17

Kavanau v. Santa Monica Rent Control Board, 941 P.2d 851 (Cal. 1997),
cert. denied, 522 U.S. 1077 (1998) 18

Lawrence v. Texas,
539 U.S. 558 (2004) 2, 21

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) 18

Mayhew v. Town of Sunnyvale,
964 S.W.2d 922 (Tex. 1997) 18

TABLE OF AUTHORITIES—Continued

Page

Neumont v. State of Florida,
451 F.3d 1284 (11th Cir. 2006) 1

Neumont v. Monroe County, Florida,
242 F. Supp. 2d 1265 (S.D. Fla. 2002) 1

Palazzolo v. Rhode Island,
533 U.S. 606 (2001) 19

Palazzolo v. State, 746 A.2d 707 (R.I.
2000), *aff'd in part, rev'd in part*,
533 U.S. 606 (2001) 18

Parratt v. Taylor,
451 U.S. 527 (1981) 12-13

Patsy v. Board of Regents,
457 U.S. 496 (1982) 15, 17

Payne v. Tennessee,
501 U.S. 808 (1991) 21-22

Pennzoil Co. v. Texaco, Inc.,
481 U.S. 1 (1987) 19-20

Richardson v. City & County
of Honolulu, 124 F.3d 1150
(9th Cir. 1997), *cert. denied*,
525 U.S. 871, 921, 1018 (1998) 20-21

Ruckelshaus v. Monsanto Co.,
467 U.S. 986 (1984) 10-12

San Diego Gas & Electric Co. v. City
of San Diego, 450 U.S. 621 (1981) 7

San Remo Hotel, L.P. v. City & County
of San Francisco, 545 U.S. 323 (2005) 2

Seminole Tribe of Florida v. Florida,
517 U.S. 44 (1996) 22

TABLE OF AUTHORITIES—Continued

Page

Soriano v. United States,
352 U.S. 270 (1957) 6, 15

Steel Improvement & Forge Co. v. United States, 355 F.2d 627 (Ct. Cl. 1966) 6

Steffel v. Thompson,
415 U.S. 452 (1974) 15, 20, 22

Tafflin v. Levitt,
493 U.S. 455 (1990) 20

Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency,
535 U.S. 302 (2002) 13-14

United States v. Clarke,
445 U.S. 253 (1980) 6-7

United States v. Dickinson,
331 U.S. 745 (1947) 6

United States v. Dow,
357 U.S. 17 (1958) 6-7

United States v. Rogers,
255 U.S. 163 (1921) 6

Williamson County Regional Planning Commission v. Hamilton Bank,
473 U.S. 172 (1985) ..... passim

Yee v. City of Escondido,
503 U.S. 519 (1992) 9

Younger v. Harris,
401 U.S. 37 (1971) 19

TABLE OF AUTHORITIES—Continued

Page

Statutes, Legislative Materials, and Court Rule

28 U.S.C. § 1343 16

§ 1491 10

42 U.S.C. § 1983 15-16

Private Property Rights Implementation Act of 1997, H.R. 1534, 105th Cong. 16

Private Property Rights Implementation Act of 2000, H.R. 2372, 106th Cong. 16

H.R. Rep. No. 106-518 (2000) 16, 19-20

Supreme Court Rule 37.2 1

Other Authorities

Brief for Respondent in *Williamson County* (No. 84-4) 9

Brief for the United States as Amicus Curiae Supporting Petitioners in *Williamson County* (No. 84-4) 9

Transcript of Argument in *Williamson County* (No. 84-4), 1985 U.S. TRANS LEXIS 76 (Feb. 19, 1985) 9

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Because respondents have withheld their consent, amici curiae hereby move to file the following brief pursuant to this Court's Rule 37.2(b).[1]

Amici curiae are a certified class of property owners in Monroe County, Florida, who are trying—and have been trying for literally more than a decade—to litigate a federal takings claim in federal court. *See generally Neumont v. State of Florida*, 451 F.3d 1284 (11th Cir. 2006). Like petitioner (and thousands of other property owners around the nation), amici are facing "ripeness" arguments by a governmental defendant who seeks to avoid federal-court adjudication of a federal constitutional claim. In particular, despite class members having filed at least two actions in state court regarding the regulatory action for which they now seek just compensation, amici have long been denied their day in federal court because they have assertedly failed to satisfy the "state procedures" requirement of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-97 (1985). *See Neumont v. Monroe County, Florida*, 242 F. Supp. 2d 1265, 1274 (S.D. Fla. 2002) (dismissing amici's federal constitutional claims for just compensation "because plaintiffs have failed to exhaust their state remedies").

---

[1] Petitioner has consented to the filing of this brief.

Counsel of record for all parties received notice at least ten days prior to the due date of amici's intention to file this brief.

No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae or its counsel made a monetary contribution to its preparation or submission.

Accordingly, for themselves and their fellow property owners around the country, amici move for leave to file this brief in order to urge the Court to grant the first question presented by petitioner and thereby reconsider *Williamson County*'s state procedures requirement.

INTRODUCTION

In one of his final opinions, Chief Justice Rehnquist wrote for himself and three other Justices "to explain why I think part of our decision in *Williamson County* . . . may have been mistaken." *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 348 (2005) (opinion concurring in the judgment). Although he had joined that decision in 1985, two decades of "further reflection and experience [led him] to think that the justifications for its state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic." *Id.* at 352. Because "no court below ha[d] addressed the correctness of *Williamson County*," [and] neither party has asked us to reconsider it," *id.*, the Chief Justice and his colleagues ultimately determined that reconsideration was not then opportune. But in "an appropriate case," he opined, "the Court should reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts." *Id.*

As petitioner persuasively argues, *this* is that case. In contrast to *San Remo Hotel*, petitioner's first question presents the issue squarely. On the merits, and as explained herein, the "state procedures" requirement of *Williamson County* "was not correct when it was decided, and it is not correct today"; therefore, it "ought not to remain as binding precedent." *Lawrence v. Texas*, 539 U.S. 558, 578 (2004). In a word, it should be *overruled*.

SUMMARY OF ARGUMENT

1. It is important to comprehend the precise federal right at issue in cases within the sweep of the state procedures requirement. The property owner in such cases sues to enforce a right to recover just compensation for a taking. That right, and the corresponding obligation of the government to pay just compensation, was always understood to accrue or arise at the time of the taking—and not later. In asserting that the right and the obligation accrued at some later point after the denial of state-law remedies in state court, *Williamson County* deviated sharply from the established understanding of the Just Compensation Clause.

2. The state procedures requirement was not one of the questions presented in *Williamson County*, and so it received only the most cursory treatment in the briefing and argument. Not surprisingly, therefore, the requirement is poorly reasoned. It rests principally on two flawed analogies to inapposite decisions that decree the unavailability of (1) equitable relief against compensable takings, and of (2) relief under the Due Process Clause for random and unauthorized deprivations of property, neither of which is remotely at issue. Nor can the requirement be justified by the principle that the Fifth Amendment proscribes only takings *without just compensation*, which supports a no-equitable-relief rule but not exhaustion of state judicial remedies.

3. The state procedures requirement possesses other defects that demonstrate its doctrinal incoherence. Among these are that the requirement is really an exhaustion mandate that conflicts markedly with the no-exhaustion-of-remedies rule governing other federal rights, as twice recognized in bills passed by the House

of Representatives. In addition, the requirement is in practice ignored by state courts (and by this Court in cases originating from state courts), although it logically should apply in those fora. Finally, while touted as promoting local decisionmaking, the requirement affirmatively invites *dis*respect for state courts by treating them as mere stations on the road to federal court.

ARGUMENT

For the following reasons, the Court should grant the petition in order to give plenary consideration to overruling the state procedures requirement fabricated in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-97 (1985).

I. In Creating the State Procedures Requirement, *Williamson County* Deviated Sharply from the Established Understanding of the Just Compensation Clause.

As petitioner notes, the court of appeals held that he "had to unsuccessfully seek relief in state court under a state law takings provision before his claim would ripen" in federal court. Pet. 4. This holding, of course, flowed directly from the "state procedures" requirement of *Williamson County*, under which a property owner must "seek compensation through the [state-law] procedures the State has provided for doing so" before presenting to the federal courts his federal claims for just compensation. 473 U.S. at 194.

A. At Issue Here Is the Right to Recover Just Compensation for Takings of Private Property for Public Use.

In fabricating the state procedures requirement, *Williamson County* referred to a property owner's claiming or suffering "a violation of the Just Compensation

Clause." 472 U.S. at 194-95; *accord id.* at 195 n.13 (referring to a "constitutional violation" stemming from a taking of property). Though it is not unusual to employ the term *violation* in a loose sense in connection with a claim for just compensation, this terminology obscures the true "nature of the constitutional right" at issue. *Id.* Property owners who pursue just compensation in court under the Fifth Amendment do not claim "constitutional violations" in the sense that they sue to enjoin or remedy state action that violates or transgresses constitutional norms. Rather, as the Court articulated in *First English Evangelical Lutheran Church v. County of Los Angeles*, these property owners sue to enforce the government's "constitutional obligation to pay just compensation" along with their corresponding "right to recover just compensation." 482 U.S. 304, 315 (1987) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960), and *Jacobs v. United States*, 290 U.S. 13, 16 (1933)). That is, the owners are pursuing a monetary remedy that is "grounded in the Constitution itself." *Id.* at 315.

B. It Was Always the Law that the Right to Recover Just Compensation Accrues at the Time of the Taking.

When does the government's constitutional obligation to pay just compensation arise? Or, to ask the same thing, when does a property owner's claim for just compensation accrue? The answer is that the taking, the obligation of the taker to pay just compensation, and the owner's claim for compensation come into being simultaneously, as this Court and the lower federal courts consistently held for decades before *Williamson County*. This Court has explained:

> When a taking occurs by physical invasion, . . . the usual rule is that the time of the invasion constitutes the act of taking, and "[it] is that event which gives rise to the claim for compensation and fixes the date as of which the land is to be valued . . . ."

United States v. Clarke, 445 U.S. 253, 258 (1980) (quoting *United States v. Dow*, 357 U.S. 17, 22 (1958)).

Numerous decisions of this Court state essentially the same rule using slightly different phraseology. In *United States v. Dickinson*, 331 U.S. 745 (1947), the Court rejected the government's argument that Dickinson's reclamation of a portion of property previously taken by flooding rendered him ineligible to be paid for the original taking: "[N]o use to which Dickinson could subsequently put the property by his reclamation efforts changed the fact that the land was taken when it was taken and *an obligation to pay for it then arose*." *Id.* at 751 (emphasis added). In *Soriano v. United States*, 352 U.S. 270 (1957), the Court held time-barred petitioner's claim for just compensation for supplies taken during World War II. Although it rejected the argument that the hostilities tolled the applicable limitations period, the Court agreed that petitioner's compensation claim "accrued at the time of the taking." *Id.*; *accord United States v. Rogers*, 255 U.S. 163, 169 (1921) (Having taken plaintiffs' lands, "it was the duty of the government to make just compensation as of the time when the owners were deprived of their property.").[2]

---

[2] The law in the Court of Claims was the same. *See, e.g., Steel Improvement & Forge Co. v. United States*, 355 F.2d 627, 631 (Ct. Cl. 1966) ("It is axiomatic that a cause of action for an unconstitutional taking accrues at the time the taking occurs.").

In short, it was the consistent rule of this Court and the lower federal courts for many decades that the constitutional obligation to pay just compensation arises, and the claim for just compensation accrues, at the time of the taking. Whether stated that the event of taking "gives rise to the claim for compensation," *Dow*, 357 U.S. at 22; *Clarke*, 445 U.S. at 258, or that the obligation to pay just compensation is triggered "[a]s soon as private property has been taken," *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting), the rule was well-established. Thus, in asserting that a property owner's monetary claim under the Just Compensation Clause does not accrue "until just compensation has been denied" by the state judicial system, 473 U.S. at 195 n.13, *Williamson County* deviated sharply from the traditional understanding of that Clause.

II. In Creating the State Procedures Requirement, *Williamson County* Built a House on Jurisprudential Sand.

Did such a sharp deviation from decades of consistent constitutional interpretation come after sustained reflection in the face of compelling new authority? Was the state procedures requirement forged in the fires of intensive and extensive doctrinal reassessment in light of developments in the law of just compensation? In a word, ***no***. In fact, quite the opposite: as explained below, the requirement was fabricated without benefit of serious briefing or argument, and it rests principally on flawed analogies to inapposite cases, as well as other misreadings of precedent.

A. The Requirement Was Fabricated Without Benefit of Serious Briefing or Argument.

In the Court's own words, it granted certiorari in *Williamson County* to decide "whether Federal, State, and Local governments must pay money damages to a landowner whose property allegedly has been 'taken' temporarily by the application of government regulations." 473 U.S. at 185. The attorneys general of nineteen states and territories, together with the Solicitor General of the United States, the National Association of Counties, the City of New York, and the City of St. Petersburg, Florida, joined the petitioner in urging the Court to reverse the court of appeals' judgment in favor of the property owner on two alternative grounds: "that a *temporary* regulatory interference with an investor's profit expectation does not constitute a 'taking,'" and "that even if such interference does constitute a taking, the Just Compensation Clause does not require *money damages* as recompense." *Id.* at 175 (emphases added). Four professional and public-interest organizations filed amicus curiae briefs urging affirmance of the judgment. *See id.* at 174.

In the end, all of this briefing was for naught, because the Court did not decide the questions presented. Instead, *Williamson County* left the temporary takings issue "for another day," as it concluded that the property owner's claim for just compensation was "premature." *Id.* at 186; *cf. First English*, 482 U.S. at 310 (deciding the issue after observing that *Williamson County* and other cases had left it undecided). The conclusion that the just compensation claim was premature rested primarily on the application of the rule that a regulatory takings claim "is not ripe until the government entity charged with implementing the regulations has reached

a final decision regarding the application of the regulations to the property at issue." *Id.*; *see also id.* at 186-94 (explicating this "final decision" requirement).

Logically, the opinion could have stopped at that point—but it did not. Instead, the opinion put forth a "second reason [why] the taking[s] claim is not yet ripe," namely, that the property owner "did not seek compensation through the procedures the State has provided for doing so." *Id.* at 194. Out of the twelve merits briefs filed in *Williamson County*, only the Solicitor General's amicus brief—and only as part of a single paragraph in its *Summary* of Argument—argued for anything approaching this "second reason." *See* Brief for the United States as Amicus Curiae Supporting Petitioners at 10; *see also* Brief for Respondent at 39 (responding to point in two short paragraphs). Furthermore, although the "state procedures" issue did arise very briefly at oral argument in *Williamson County*, the Solicitor General's representative refused even to give an unequivocal answer to the question whether "a property owner would have to follow judicial review remedies as well for [regulatory action] to ripen into a taking." 1985 U.S. TRANS LEXIS 76, at *25-26 (Feb. 19, 1985); *see also id.* at *26 ("I think it tends to blend in with the question of whether there should be abstention on the state law question of whether the commission had properly applied state law.").

B. The Requirement Rests Principally on Two Flawed Analogies to Inapposite Decisions.

There are good reasons why the Court "ordinarily do[es] not consider questions outside those presented in the petition for certiorari," and why the Court disregards that rule "only in the most exceptional cases." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). The

"state procedures" aspect of *Williamson County* is a perfect illustration of such reasons. When the questions presented did not even touch on state judicial remedies and when the matter did not receive serious briefing or argument, it is no surprise that the fabrication of the state procedures requirement rested principally on two flawed analogies to inapposite decisions.

1. *Ruckelshaus v. Monsanto Co.*

First, the opinion cited *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016-20 (1984), for the notion that "takings claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act." 473 U.S. at 195. From this notion, the opinion purported to draw an analogy: "Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Id.* at 196. Regardless of the plausibility of the analogy, the premise is wholly bogus. If "takings claims" are meant in this passage to refer to monetary claims for just compensation for completed takings of private property—the actual claim that the property owner asserted in *Williamson County*—then the cited passage from *Monsanto* did not even consider such claims, let alone declare them "premature" until after the property owner had sued the United States under the Tucker Act.[3]

---

[3] The Tucker Act grants the Court of Federal Claims subject matter jurisdiction over "any claim against the United States founded upon . . . the Constitution," 28 U.S.C. § 1491(a)(1), including monetary claims for just compensation under the Fifth Amendment.

In *Monsanto*, a company sued in federal district court "seeking *injunctive and declaratory relief* from the operation of" various provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), alleging that "all of the challenged provisions effected a 'taking' of property without just compensation, in violation of the Fifth Amendment." 467 U.S. at 998-99 (emphasis added). Having concluded that some of the challenged provisions might conceivably operate to take the company's property in some circumstances, the Court proceeded to consider (in the passage cited by *Williamson County*) whether that conclusion supported the requested injunctive relief. *Monsanto* concluded that it did not, based on the established rule that "[e]*quitable relief* is not available to enjoin an alleged taking of private property for public use . . . when a suit for compensation can be brought against the sovereign subsequent to the taking." *Id.* at 1016 (emphasis added); *see also id.* at 1017-19 (concluding that such a suit could be brought under the Tucker Act). Thus, the company's request for equitable relief under the Fifth Amendment was not merely *premature*, it was *not available at all*. In other words, there was nothing the company could do to "ripen" its claim for equitable relief; rather, that claim simply had no merit, period.

What about a Tucker Act suit against the government in the Court of Federal Claims? Could such a suit be called a *prerequisite* to asserting a *monetary* claim against the government for just compensation for a taking of property? No, as the *Monsanto* decision confirms, a Tucker Act lawsuit ***is*** the assertion of a claim for just compensation: "whatever taking may occur is one for public use, and a Tucker Act remedy is available to provide Monsanto with just compensation." *Id.* at 1020;

accord supra note 3. Thus, if *Williamson County* were correct that a property owner must "avail[] itself of the process provided by the Tucker Act" *before* pursuing its claim for just compensation, 473 U.S. at 195, then it would be the rule that a property owner must essentially bring a Tucker Act suit before bringing a Tucker Act suit. In other words, an owner's Tucker Act suit for just compensation would be "premature" until the property owner had brought a Tucker Act suit for just compensation. *Id.* Obviously, this *reductio ad absurdum* deserves no respect, and *Monsanto* provides no reasoned basis for the state procedures requirement.

2. *Parratt v. Taylor*

The fabrication of the state procedures requirement in *Williamson County* also rested on the supposed analogy between takings of private property "without just compensation" and deprivations of property "without due process of law." The Court relied on *Parratt v. Taylor*, 451 U.S. 527 (1981), which it described as having "ruled that a person deprived of property through a random and unauthorized act by a state employee does not state a claim under the Due Process Clause merely by alleging the deprivation of property." 473 U.S. at 195. In this situation, "the State's action is not 'complete' in the sense of causing a constitutional injury 'unless or until the State fails to provide an adequate postdeprivation remedy for the property loss.'" *Id.* (quoting *Hudson v. Palmer*, 468 U.S. 517, 532 n.12 (1984)). Then came another purported analogy: "Likewise, because the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action here is not 'complete' until the State fails to provide adequate compensation for the taking." *Id.*

This analogy has two fatal flaws. First, it provides no support for the go-first-to-state-court requirement actually imposed by *Williamson County*. When a state does indeed "provide an adequate postdeprivation remedy for the property loss" as contemplated by *Parratt*, the deprived property owner does not pursue that state-law remedy *before* suing in federal court under the Due Process Clause. To the contrary, the property owner must pursue the state-law remedy *instead of* suing in federal court. As *Williamson County* put it, the owner who has such a remedy categorically "does not state a claim under the Due Process Clause." 473 U.S. at 195. If the analogy with the Just Compensation Clause were valid, the property owner having a state-law remedy for just compensation categorically could not state a claim under the Just Compensation Clause *in any court*. Obviously, no one believes that, then or now.

Second, and more important, the notion that "the State's action [in respect to a taking] is not 'complete' until the State fails to provide adequate compensation for the taking," *id.*, is flatly contrary to the Court's sustained and reasoned consideration of the matter in *First English*. There, the Court held that the government's taking of property, without more, gives rise to an "obligation to pay just compensation" on the government's part, and a corresponding "right to recover just compensation" on the owner's part. 482 U.S. at 315. While a postdeprivation remedy might allow the government to escape liability for a denial of procedural due process (as in *Parratt*), once a taking has occurred, governmental liability for just compensation is inescapable: "*no subsequent action* by the government can relieve it of the duty to provide compensation." *Id.* at 321 (emphasis added). This formulation has continued to command the Court's assent. *See Tahoe-Sierra Preservation Council v. Tahoe*

Regional Planning Agency, 535 U.S. 302, 328 (2002) (quoting this passage and opining that "nothing that we say today qualifies [that] holding" of *First English*).

C. The Requirement Finds No Support in the Principle that the Amendment Proscribes Only Takings *Without Just Compensation*.

Along with flawed analogies to *Monsanto* and *Parratt*, *Williamson County* relied on the uncontroversial principle that the "Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." 473 U.S. at 194. Indeed, this principle was so significant that the opinion both reiterated and emphasized the point: "because the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied." *Id.* at 195 n.13.

Both of these propositions are quite true; both are also quite irrelevant to whether property owners must seek just compensation in state court under state law. As explained in Part I.A above (pp. 4-5), property owners who seek just compensation under the Fifth Amendment are not seeking to "proscribe" (i.e., enjoin) takings, and they are not asserting "constitutional violations." Instead, these owners are asserting a federal "right to recover just compensation," the monetary remedy that is "grounded in the Constitution itself."

To put the point another way, the principle that the Fifth Amendment proscribes (only) those takings that are without just compensation leads not to the state procedures requirement but rather to the rule (reiterated in *Monsanto*) that "[e]quitable relief is not available to enjoin an alleged taking of private property for public use . . . when a suit for compensation can be brought against

the sovereign subsequent to the taking." 467 U.S. at 1016, *discussed at supra* p. 11. That is, the "proscribes takings without just compensation" point cited by *Williamson County* is a perfectly good basis for rebuffing property owners who ask federal courts to *enjoin state regulatory programs*; however, it is no basis whatever for rebuffing property owners who ask federal courts to *award just compensation*.

III. The State Procedures Requirement Has Other Defects that Show Its Doctrinal Incoherence.

If *Williamson County*'s state procedures requirement was not correct when it was decided, then it is also defective in additional ways that have come to light in the past two decades. Petitioner has explicated some of those defects. *See* Pet. 11-24. In the following sections, amici discuss three other defects.

A. The Requirement Is Inconsistent with the No-Exhaustion-of-Remedies Rule Governing Other Federal Rights.

The intended effect of *Williamson County*'s state procedures requirement is to remit property owners with what had long been described as "accrued" *federal* claims for just compensation, *Soriano*, 352 U.S. at 275, to *state* courts to pursue remedies under *state* law. This result is anomalous on its face, and it is especially jarring given the Court's long-standing and firm refusal, with respect to *other* federal claims asserted under 42 U.S.C. § 1983, to "require[] exhaustion of state *judicial* . . . remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974) (emphasis added), *quoted in Patsy v. Board of Regents*, 457 U.S. 496, 500 (1982). In practice, therefore, the state procedures requirement has effectively

caused the Just Compensation Clause, "as much a part of the Bill of Rights as the First Amendment or [the] Fourth Amendment, [to] be relegated to the status of a poor relation," despite protestations to the contrary in *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

The House of Representatives views the state procedures requirement as an "exhaustion" mechanism applying only to claims for just compensation, and it has twice passed bills to eliminate it.[4] The House Judiciary Committee's report on the latter bill made clear that the non-exhaustion provision had as its target *Williamson County*'s state procedures requirement, for the House viewed the requirement as the kind of exhaustion-of-judicial-remedies rule that was *rejected* in *Steffel*, *Patsy*, and many other decisions of this Court. *See* H.R. Rep. No. 106-518, at 13 & n.3 (2000). The committee report explained that the "combined effect of *Williamson County*, and the application of issue and claim preclusion, is to drive out of Federal court virtually all Federal claims for just compensation for takings of private property by local governments." *Id.* at 13. As a result of the state procedures requirement, then, "property rights are procedurally disadvantaged compared to other civil rights." *Id.* (section heading).

---

[4] *See* Private Property Rights Implementation Act of 1997, H.R. 1534, 105th Cong., § 2 (adding 28 U.S.C. § 1343(e)(3) to provide that property owners seeking to enforce the Just Compensation Clause pursuant to 42 U.S.C. § 1983 need not "exhaust judicial remedies provided by any State or territory"); Private Property Rights Implementation Act of 2000, H.R. 2372, 106th Cong., § 2 (adding 28 U.S.C. § 1343(e)(4) to provide that claims for just compensation asserted pursuant to § 1983 are "ripe for adjudication even if the party seeking redress does not exhaust judicial remedies provided by any State or territory").

B. The Requirement Is in Practice Ignored by State Courts and by this Court.

If the state procedures requirement truly derives from the "nature" of the federal right to just compensation—as opposed to being merely a "procedural scheme under which claims may be heard in federal courts," *Patsy*, 457 U.S. at 501—then the requirement necessarily governs regardless of the judicial forum in which the federal right is asserted. In other words, under the logic of *Williamson County*, "a property owner cannot claim a violation of the Just Compensation Clause" *even in state court* until he has used the "procedure for seeking just compensation" provided by the state. 473 U.S. at 195. In other words, no *federal* claim for just compensation may be presented to a *state* court until the owner has fully (and unsuccessfully) litigated his state-law claim for compensation (in the state judicial system).

This precept follows unassailably from the state procedures requirement; this precept is also uniformly ignored both by state courts themselves and this Court. As for state courts, amici are aware of none that refuses to adjudicate *federal* claims for just compensation on the ground that they are premature until a property owner has pursued to completion all claims for compensation under *state* law. To the contrary, it is not difficult to cite examples of state judicial systems that will adjudicate federal claims for just compensation *before* state-law compensation claims have been fully litigated.[5]

---

[5] *See, e.g., Jacobs Wind Electric Co. v. Department of Transportation*, 626 So. 2d 1333, 1337 (Fla. 1993) (contemplating that a patent holder would assert its claims under the federal Just Compensation Clause *along with* its claims under the state

(continued...)

As for this Court, consider the last two pure regulatory takings cases it has entertained on certiorari to state courts. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1009 (1992), the Court observed that following the enactment of the relevant state statute, "Lucas promptly filed suit in the South Carolina Court of Common Pleas, contending that the Beachfront Management Act's construction bar effected a taking of his property without just compensation." Even though the Court postponed its discussion of the merits to address whether Lucas had satisfied *Williamson County*'s "final decision" requirement, *see id.* at 1010-14, the Court was not concerned in the least whether Lucas had also satisfied *Williamson County*'s "state procedures" requirement by litigating to completion whatever state-law claims for compensation he might have had prior to his asserting his federal claim for just compensation.

---

[5] (...continued)
analogue thereto and state common law); *Kavanau v. Santa Monica Rent Control Board*, 941 P.2d 851, 855 (Cal. 1997) (observing that the property owner brought a claim for " 'just compensation' in the form of lost rental income and interest" under both "article I, section 19 of the California Constitution and the Fifth Amendment of the United States Constitution"), *cert. denied*, 522 U.S. 1077 (1998); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 930 (Tex. 1997) (finding ripe the plaintiff's "just compensation takings claims" brought at the same time "under the United States Constitution and Texas Constitution"); *Palazzolo v. State*, 746 A.2d 707, 711 (R.I. 2000) (observing that plaintiff "brought an inverse condemnation action" that asserted "a taking of his property for which he was entitled to compensation pursuant to the United States and Rhode Island Constitutions"), *aff'd in part, rev'd in part*, 533 U.S. 606 (2001).

Likewise, in *Palazzolo v. Rhode Island*, 533 U.S. 606, 611 (2001), the Court observed that following proceedings before the state Coastal Resources Management Council, Palazzolo "sued in state court, asserting the Council's application of its wetlands regulations took the property without compensation in violation of the Takings Clause of the Fifth Amendment." Again, while the Court addressed the final decision requirement at length, *see id.* at 618-26, it gave no attention to the state procedures rule. In contrast to *Williamson County*, the Court surely did not bother to assure itself that, *before* Palazzolo first asserted his federal claim for just compensation, he did indeed "seek compensation through the procedures the State has provided for doing so."

C. The Requirement Invites Disrespect for State Courts by Treating Them as Mere Stations on the Road to Federal Court.

In a letter expressing its (unsuccessful) opposition to passage by the House of a bill eliminating the state procedures requirement, *see supra* note 4 and accompanying text, the Justice Department cited "'a proper respect for State functions'" in contending that "State courts are as capable as Federal courts in adjudicating local land use cases." H.R. Rep. No. 106-518, at 37, 42 (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)). An argument like this naturally evokes the decisions of this Court calling for a "proper respect for the ability of state courts to resolve federal questions presented in state-court litigation." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14 (1987). Amici concur with the Department that this respect should influence the Court's thinking about the state procedures requirement. But as set forth below, the requirement in fact invites *dis*respect for state courts and their ability to resolve federal questions.

It has long been recognized that, notwithstanding "the paramount role Congress has assigned to the federal courts to protect constitutional rights," *Steffel*, 415 U.S. at 473, generally "the state and federal courts have concurrent jurisdiction of suits of a civil nature arising under the Constitution and laws of the United States." *Grubb v. Public Utilities Commission*, 281 U.S. 470, 476 (1930); *accord, e.g., Tafflin v. Levitt*, 493 U.S. 455, 459 (1990). Monetary claims under the Just Compensation Clause are within this general rule, and state courts routinely adjudicate such federal claims against state and local governments.

Consider a procedural regime in which both state courts and lower federal courts adjudicate the federal claims for just compensation respectively presented to each. The property owners who agree with the Justice Department's prediction that "State courts are likely to be as sympathetic to local property owners as Federal courts," H.R. Rep. No. 106-518, at 37, will gravitate naturally toward the former; those who disagree, toward the latter. Each court system will develop federal takings law subject to this Court's review and without interference from the other. Such a regime would not only yield more efficient decisionmaking, it would also truly show that "proper respect for ability of state courts to resolve federal questions presented in state-court litigation" enunciated in *Pennzoil Co.*, 481 U.S. at 14.

By contrast, consider the regime created by the state procedures requirement of *Williamson County*. Under that regime, federal courts consider state courts not as parallel departments of a dual sovereign but instead as "hurdles" to be overcome on the road to resolution of claims by federal courts. *E.g., Richardson v. City & County of Honolulu*, 124 F.3d 1150, 1165 (9th Cir.

1997), *cert. denied*, 525 U.S. 871, 921, 1018 (1998); *Eide v. Sarasota County*, 908 F.2d 716, 720-21 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991). Moreover, federal courts send property owners packing off to state courts to litigate state-law claims they do not wish to pursue and to obtain rulings that may have absolutely no consequence in later federal proceedings. Forcing pointless detours to state courts in order to litigate sideshow issues show affirmative *dis*respect for those courts rather than the requisite proper respect.

CONCLUSION

As the Court has often reiterated, the doctrine of *stare decisis* is "not . . . an inexorable command." *Lawrence*, 539 U.S. at 577 (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)). It is, instead, "a principle of policy" that must yield when the rationale of a prior decision "does not withstand careful analysis." *Id.* As this brief has shown, the state procedures requirement of *Williamson County* cannot withstand such analysis: it was fashioned in circumstances that warrant no confidence its soundness, and "precedents before and after its issuance contradict its central holding." *Id.* Though state and local governments "rely" on it as a convenient means to exhaust property owners having the temerity to assert federal claims for just compensation, "there has been no individual or societal reliance on [it] of the sort that could counsel against overturning its holding once there are compelling reasons to do so." *Id.*

This last point is crucial, for we may expect a chorus from respondents and their amici regarding how the state procedures requirement is a pillar of Western Civilization and how overruling it will usher in a new Dark Ages. We think this chorus is largely driven by the desire of these governments and their allies to narrow the

substantive scope of takings law. While that desire is understandable, we are confident that all Members of this Court will resist the temptation to treat the state procedures requirement as a stand-in for disputes about the substantive reach of the Just Compensation Clause. Whether that Clause affords broad relief to property owners, narrow relief, or even no relief at all, should not matter here: in accord with "the paramount role Congress has assigned to the federal courts to protect constitutional rights," *Steffel*, 415 U.S. at 473, the answers to that question ought to be resolved in federal court without requiring exhaustion of state-law remedies in state court.

As the Court has repeatedly stated, when "governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent." *Seminole Tribe v. Florida*, 517 U.S. 44, 63 (1996) (quoting *Payne*, 501 U.S. at 827). The Court should not feel constrained here: this is truly the "appropriate case" to reconsider—and ultimately overrule—the unworkable, and badly reasoned, state procedures requirement of *Williamson County*.

The petition for writ of certiorari should be granted.

Respectfully submitted.

HAROLD E. WOLFE, JR.
HAROLD E. WOLFE, JR., P.A.
Suite 302, Executive Centre
2300 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
(561) 697-4100

ERIC GRANT
Counsel of Record
ATTORNEY AT LAW
Suite 100
8001 Folsom Boulevard
Sacramento, CA 95826
(916) 388-0833

Counsel for Amici Curiae

December 2007

77 MOTION FILED
DEC 17 2007
(3)

No. 07-635

IN THE

Supreme Court of the United States

BRUCE PETERS,

Petitioner,

v.

VILLAGE OF CLIFTON, an Illinois municipal corporation; ALEXANDER, COX & MCTAGGERT, INC.; and JOSEPH MCTAGGERT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF, AND

BRIEF OF AMICUS CURIAE JOYCE YAMAGIWA, AS TRUSTEE, IN SUPPORT OF PETITIONER

MICHAEL M. BERGER
Counsel of Record
GIDEON KANNER
MANATT, PHELPS & PHILLIPS, LLP
11355 West Olympic Blvd.
Los Angeles, CA 90064-1631
(310) 312-4000
Counsel for Amicus Curiae
Joyce Yamagiwa, Trustee

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Joyce Yamagiwa, Trustee, respectfully moves for leave to file the attached brief amicus curiae in this case.*

The consent of the attorney for the Petitioner has been obtained and filed with the Clerk of this Court. The consent of the attorney for the Respondent was requested but refused. Pursuant to Rule 37, Yamagiwa's counsel notified counsel for both Petitioner and Respondent of her intent to file this motion and Brief of Amicus Curiae more than ten days before the due date of this brief.

Yamagiwa is the plaintiff in a case now pending in the U.S. District Court for the Northern District of California in which the ripeness issue presented by the Petitioner here has been raised by the defendant, albeit in a slightly different procedural posture. There, after Yamagiwa filed suit in the California state courts, the defendant removed the matter to U.S. District Court. Then, after trial, and in post-trial briefing, the defendant asked the court to dismiss as unripe the case it had

---

* Ms. Yamagiwa appears as Trustee of the Trust Created Under Trust Agreement Dated January 30, 1980 By Charles J. Keenan, III and Anne Marie Keenan, for the Benefit of Charles J. Keenan, IV, as to an Undivided 50% Interest, and Trustee Under Trust Agreement Dated January 30, 1980, By Charles J. Keenan, III and Anne Marie Keenan for the benefit of Ann Marie Keenan, as to an Undivided 50% Interest.

removed to federal court in the first place. Given the prudential nature of the ripeness rule, and the significant investment of the time of the court and the parties to try the case, the District Court refused and rendered a decision in Yamagiwa's favor. (*Yamagiwa v. City of Half Moon Bay*, No. C-05-4149-VRW; 2007 WL 4276385 (N.D. Cal. 2007).) The matter is expected to be appealed, and the issue is expected to be raised again.

Yamagiwa's case is, like this one, a physical taking case, seeking constitutional compensation. In a nutshell, public works of the defendant city inundated land which the city had earlier approved for residential housing and turned it into a wetland which could not be developed for anything. The city revoked the development permission it had earlier given. The U.S. District Court found a physical taking and ordered compensation. Judgment has not yet been entered.

The issue presented by the Petition arises in a number of different procedural contexts. It has bedeviled lower courts and litigants for years, to the point where four Justices of this Court openly called for change two years ago. The attached brief will expand on the necessity for certiorari and the need to end this diversionary issue now.

Respectfully submitted,
Michael M. Berger
Counsel for Yamagiwa
Manatt Phelps & Phillips
11355 W. Olympic Blvd.
Los Angeles CA 90064

TABLE OF CONTENTS

Motion for Leave to File Amicus Curiae Brief.....i

Table of Contents.....iii

Table of Authorities.....v

Brief of Amicus Curiae.....1

Interest of the Amicus Curiae.....1

Summary of Argument.....3

Argument.....4

I. The *San Remo* Concurrence Was Correct: It Is Time To End The Confusion And The Unfairness Caused By *Williamson County*...3

A. The Scholarly Community Has Harshly Criticized *Williamson County*'s "Ripeness" Test.....6

B. Lower Courts Found The *Williamson County* Rule So Unsatisfying That They Sought Ways Around It.....8

C. *Williamson County* Has Plainly Operated as a Trap For Property Owners With Takings Claims.....10

D. This Court Created At Least Confusion — If Not Outright Conflict — When It Added Both *City of Chicago* and *San Remo* To Its Jurisprudence.....10

II. A Rule Developed Wholly In The Context Of Regulatory Takings Should Not Apply To Physical Takings.....13

Conclusion.....14

TABLE OF AUTHORITIES

CASES

City of Chicago v. International College of Surgeons,
522 U.S. 156 (1997).....10, 11

Complete Auto Transit, Inc. v. Brady,
430 U.S. 274 (1977).....4, 10

Continental T.V., Inc. v. GTE Sylvania, Inc.,
433 U.S. 36 (1977).....4

Dodd v. Hood River County,
59 F.3d 852 (9th Cir. 1995).....9

Fields v. Sarasota-Manatee Airport Auth.,
953 F.2d 1299 (11th Cir. 1992)..... 9

Funk v. United States,
290 U.S. 371 (1933).....4

Kottschade v. City of Rochester,
319 F.3d 1038 (8th Cir.),
cert. denied, 540 U.S. 825 (2003).....9, 11

Lingle v. Chevron U.S.A.,
544 U.S. 528 (2005).....4

McDaniel v. Sanchez,
452 U.S. 130 (1981).....5

San Remo Hotel v. City & County of San Francisco,
545 U.S. 323 (2005).....3-5, 9-12

Santini v. Connecticut Hazardous Waste Management Service,
342 F.3d 118 (2d Cir. 2003).....9, 10

S.E.C. v. United Benefit Life Ins. Co.,
387 U.S. 202 (1967).....4

Tahoe-Sierra Preservation Council v. Tahoe Reg. Plan. Agency,
535 U.S. 302 (2002).....13, 14

Williamson County Reg. Plan. Commn. v. Hamilton Bank,
473 U.S. 172 (1985).....2-12

Yamagiwa v. City of Half Moon Bay,
2007 WL 4276385 (N.D. Cal. 2007).....ii, 2

STATUTES

28 U.S.C. § 1441(a).....11

ARTICLES

Stephen E. Abraham, Williamson County *Fifteen Years Later: When Is a Takings Claim (Ever) Ripe?*,
36 Real Prop., Probate & Trust J. 101 (2001).....7

Peter A. Buchsbaum, *Should Land Use Be Different? Reflections on* Williamson County Reg'l Planning Bd. v. Hamilton Bank,
In Taking Sides on Takings Issues
(Thomas E. Roberts, ed. 2002).....7, 10

David A. Dana & Thomas W. Merrill, Property Takings (2002).....10

Steven J. Eagle, *The Development of Property Rights in America and the Property Rights Movement*, 1 Geo. J.L. & Pub. Pol'y 77 (2002).....8, 10

Robert H. Freilich & Joseph M. Divebliss, *The Public Interest is Vindicated*: City of Monterey v. Del Monte Dunes, 31 Urb. Law. 371 (1999).....7

Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. West. L. Rev. 1 (1992).....10

Kathryn E. Kovacs, *Accepting the Relegation of Takings Claims to State Courts: The Federal Courts' Misguided Attempts to Avoid Preclusion Under* Williamson County, 26 Ecology L.Q. 1 (1999).....6

Jan G. Laitos, Law of Property Rights Protection, (1999).....8

Robert Meltz, Dwight H. Merriam & Richard M. Frank, The Takings Issue (1999).....7

Gregory Overstreet, *Update on the Continuing and Dramatic Effect of the Ripeness Doctrine on Federal Land Use Litigation*, 20 Zoning & Plan. L. Rep. 17 (1997).....7

Thomas E. Roberts, *Facial Takings Claims Under* Agins-Nectow: *A Procedural Loose End*, 24 U. Hawaii L. Rev. 623 (2002).....6

Thomas E. Roberts, *Fifth Amendment Taking Claims in Federal Court: The State Compensation Requirement and Principles of Res Judicata*, 24 Urb. Law. 479, 480 (1992).....6

Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envt'l L. 37 (1995).....7

Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1 (1995).....7

Testimony of Prof. Daniel R. Mandelker, reproduced at 31 Urb. Law. 232 (1999).....7

BRIEF OF AMICUS CURIAE

Joyce Yamagiwa submits this Amicus Curiae Brief in support of Petitioner Bruce Peters.[1]

INTEREST OF AMICUS CURIAE

Joyce Yamagiwa, as trustee, is the owner of a 24.7 acre parcel of undeveloped land in the city of Half Moon Bay, California. The property has been planned and zoned for residential development for over 30 years. Indeed, the city approved an 83-home project for this site in 1990. Before construction could commence, however, the city imposed a series of moratoria When the moratoria were finally lifted, the city refused to allow the subdivision to proceed, finding that wetlands had developed on the property.

The city itself had constructed a stormwater drainage project both on and near the property. During construction, the city "borrowed" soil from the property (digging out the areas planned for the location of streets called for by the development) for use in a nearby municipal project. The

---

[1] The parties were notified more than ten days before filing of the intent to file. Petitioner consented; Respondents did not.

No counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae or its counsel made a monetary contribution to its preparation or submission.

combination of the excavations the city made on the property and the faulty functioning of its storm drainage system caused water to pond on the property. Eventually, enough water stayed there for a long enough period that most of the property became "wetlands," said to be an environmentally sensitive area that could not legally be developed.

Yamagiwa sued the city in state court. The city removed the case to U.S. District Court because of its federal taking and substantive due process claims. For two years, the parties litigated in federal court, ending in a two-week bench trial.

In the post-trial briefing, the city suddenly asked the trial court to hold that the case that the city had itself removed to federal court because of the presence of federal constitutional issues was not really ripe for federal litigation. Its theory was that *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985) mandated remand of the case to state court. The District Court refused, concluding that *Williamson County* ripeness is prudential, and that it would not be prudential to waste two years of the court's time and the parties' effort and expense only to begin anew on the same issues in a different courthouse. The court held that the city had taken Yamagiwa's property and owed compensation. (*Yamagiwa v. City of Half Moon Bay*, 2007 WL 4276385.)

It is anticipated that the city will appeal and that the *Williamson County* issue will be raised again. Yamagiwa has a strong interest in having this Court hold either (1) *Williamson County*'s state

court litigation requirement was wrongly decided and should be overruled, or (2) if *Williamson County* remains a valid test for *regulatory* takings, it has no application to *physical* takings.

SUMMARY OF ARGUMENT

Williamson County has caused confusion and turmoil since it was decided. Its conclusion that a takings claim could be "ripened" for litigation in the federal courts by filing a claim based on the same facts under parallel state constitutional provisions and losing the ensuing action in the state courts has served as nothing but a costly, inefficient, and elaborate trap for property owners. Lower courts and commentators have vied with each other to come up with suitably critical descriptions of it that they could conjure. Some lower federal courts sought ways to construe around the evident res judicata problems created by trying to "ripen" a case by losing it in state court.

It is unfortunate that the issue was not squarely presented to the Court in *San Remo Hotel v. City & County of San Francisco*, 545 U.S. 323 (2005). The application of the *Williamson County* rule in that case evidently struck such a responsive chord with the Court that four Justices joined in a concurring opinion authored by the late Chief Justice urging that the *Williamson County* state court litigation rule be examined and rejected at an early opportunity. It is time for the Court to do just that.

ARGUMENT

I. THE *SAN REMO* CONCURRENCE WAS CORRECT: IT IS TIME TO END THE CONFUSION AND THE UNFAIRNESS CAUSED BY *WILLIAMSON COUNTY*

Precedent is not cast aside lightly. Nor should it be. However, as important to the law as *stare decisis* is, even this Court's decisions are not carved on stone tablets.[2] History has shown that when the scholarly community has been critical of its decisions,[3] when application of a precedent has produced a rule which "stands only as a trap for the unwary,"[4] when necessary to clarify the implications of earlier decisions in light of more recent history,[5] when decisions of this Court are "if not directly" conflicting, "are so in principle,"[6] or when "the answer suggested by our prior opinion is

---

[2] See *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 531, 548 (2005) (overruling a relatively recent takings law precedent which proved to be doctrinally anomalous) ("Today we correct course.").

[3] *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 48 (1977).

[4] *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

[5] *S.E.C. v. United Benefit Life Ins. Co.*, 387 U.S. 202, 207 (1967).

[6] *Funk v. United States*, 290 U.S. 371, 374 (1933).

not free of ambiguity,"[7] the Court has reconsidered prior decisions.[8] This is such a time in history.

That the *Williamson County* rule fits the Court's list of reasons to reexamine precedent was made evident in *San Remo Hotel*. The late Chief Justice's concurring opinion (joined by Justices O'Connor, Kennedy and Thomas) noted that "*Williamson County*'s state-litigation rule has created some real anomalies . . . all but guarantee[ing] that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation guarantee." (545 U.S. at 351.) Acknowledging that other litigants are not subjected to such a rule, the concurring opinion questioned "why federal takings claims in particular should be singled out to be confined to state court . . . ." (545 U.S. at 351.) The opinion concludes that "the justifications for [*Williamson County*'s] state litigation requirement are suspect, while its impact on takings plaintiffs is dramatic" and urges the Court to "reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts." (545 U.S. at 352.)

This is the case for which the *San Remo* concurrence was searching. It is time to reexamine the *Williamson County* rule and, upon such examination, to align the rights of property owners

---

[7] *McDaniel v. Sanchez*, 452 U.S. 130, 136 (1981).

[8] *Continental*, 433 U.S. at 48-49.

with those of others seeking to enforce guarantees from the Bill of Rights.

A. The Scholarly Community Has Harshly Criticized *Williamson County*'s "Ripeness" Test

Almost from its inception, *Williamson County*'s ripeness rule — applied as requiring a property owner claiming a regulatory taking to seek compensation in state court before a Fifth Amendment Claim would be ripe for federal court litigation — has been questioned by legal scholars. Even those who favor its result, agree that its wording and its application are, at best, confusing and perhaps much worse.

Indeed, legal scholars seem to have engaged in some sort of competition to discern who could devise the harshest way to describe the impact of *Williamson County* on litigants. Scholarly descriptions run the gamut and include "unpleasant,"[9] "ironic,"[10] "ill-considered,"[11]

---

[9] Thomas E. Roberts, *Fifth Amendment Taking Claims in Federal Court: The State Compensation Requirement and Principles of Res Judicata*, 24 Urb. Law. 479, 480 (1992).

[10] Kathryn E. Kovacs, *Accepting the Relegation of Takings Claims to State Courts: The Federal Courts' Misguided Attempts to Avoid Preclusion Under* Williamson County, 26 Ecology L.Q. 1, 20 (1999).

[11] Thomas E. Roberts, *Facial Takings Claims Under* Agins-Nectow: *A Procedural Loose End*, 24 U. Hawaii L. Rev. 623, 635 (2002).

"dramatic,"[12] "shocking" and "absurd"[13] "worse than mere chaos,"[14] "inherently nonsensical" and "self-stultifying,"[15] "riddled with obfuscation and inconsistency,"[16] "surprising,"[17] "misleading,"[18] "bewildering,"[19] "unclear and inexact,"[20] "paradoxical,"[21] "nonsense" and "an anomaly,"[22]

[12] Gregory Overstreet, *Update on the Continuing and Dramatic Effect of the Ripeness Doctrine on Federal Land Use Litigation*, 20 Zoning & Plan. L. Rep. 17 (1997).

[13] *Id.* at 27.

[14] Robert H. Freilich & Joseph M. Divebliss, *The Public Interest is Vindicated*: City of Monterey v. Del Monte Dunes, 31 Urb. Law. 371, 387 (1999).

[15] *Id.*

[16] Testimony of Prof. Daniel R. Mandelker, reproduced at 31 Urb. Law. 232, 236 (1999).

[17] Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envt'l L. 37, 67 (1995).

[18] *Id.* at 71.

[19] Stephen E. Abraham, Williamson County *Fifteen Years Later: When Is a Takings Claim (Ever) Ripe?* 36 Real Prop., Probate & Trust J. 101, 126 (2001).

[20] Robert Meltz, Dwight H. Merriam & Richard M. Frank, The Takings Issue 67 (1999).

[21] Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1, 22 (1995).

[22] Peter A. Buchsbaum, *Should Land Use Be Different? Reflections on* Williamson County Reg'l Planning Bd. v. Hamilton Bank in Taking Sides on Takings Issues 471, 472, 480 (Thomas E. Roberts, ed. 2002).

"most confusing,"[23] and containing an "*Alice in Wonderland* quality."[24]

While it is true that the scholarly community does not constitute some sort of super reviewing body able to disavow the Court's opinions, the sheer volume and intensity of criticism should give the Court pause. More than that, the criticism comes not only from those who oppose the rule, but from commentators who believe that regulatory taking litigation belongs in state court — precisely where *Williamson County* puts it. However, even they agree that the analysis and application of *Williamson County*, with its clear promise of a federal litigational forum after a state litigation loss is theoretically wrong, factually incorrect, and cruel to property owners seeing constitutional protection of their rights. Such scholarly unanimity shows the need for reconsideration.

B. Lower Courts Found The *Williamson County* Rule So Unsatisfying That They Sought Ways Around It

Federal Courts of Appeals agreed with the scholarly unhappiness with *Williamson County* and the way they perceived its rule to operate. They

---

[23] Jan G. Laitos, Law of Property Rights Protection, p. 10-20 (1999).

[24] Steven J. Eagle, *The Development of Property Rights in America and the Property Rights Movement*, 1 Geo. J.L. & Pub. Pol'y 77, 111 (2002).

termed it "odd,"[25] "unfortunate,"[26] "anomalous,"[27] "draconian" and "revolutionary,"[28] "ironic and unfair."[29]

In consequence, some courts sought to devise rules to fulfill what they thought was the promise of *Williamson County*, i.e., that after landowners had ripened their federal claims by filing *and losing* parallel constitutional claims under state law in state court, they could litigate their Fifth Amendment claims in federal court. (E.g., *Santini*, 342 F.3d at 130; *Fields*, 953 F.2d at 1307.)

Ultimately, this Court held that such exceptions to the Full Faith and Credit Act could not stand. (*San Remo*, 545 U.S. at 342-345.) Nonetheless, the fact that federal courts of appeals found it necessary to create such exceptions due to their view of the role of federal courts as the protectors of individual rights, demonstrates the concerns that those courts had about the unfairness inherent in the workings of *Williamson County*.

---

[25] *Fields v. Sarasota-Manatee Airport Auth.*, 953 F.2d 1299, 1307, n. 8 (11th Cir. 1992).

[26] *Id.* at 1306, n. 5.

[27] *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 (8th Cir. 2003).

[28] *Dodd v. Hood River County*, 59 F.3d 852, 861 (9th Cir. 1995).

[29] *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118, 130 (2d Cir. 2003).

C. *Williamson County* Has Plainly Operated as a Trap For Property Owners With Takings Claims

Both courts and commentators agree that litigants who attempt to follow *Williamson County* fall into the kind of "trap" described by this Court in *Complete Auto Transit,* 430 U.S. at 279,[30] a trap that should be eliminated from American jurisprudence. Regardless of the Court's rejection of Circuit Court efforts to avoid springing such a trap in *San Remo*, the existence of the trap cannot be gainsaid. *Williamson County* remains on the books, along with *San Remo*'s affirmation of the impact of state court litigation. The trap remains.

D. This Court Created At Least Confusion — If Not Outright Conflict — When It Added Both *City of Chicago* and *San Remo* To Its Jurisprudence

Twelve years after *Williamson County*, the Court decided *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997). There, as

---

[30] E.g., *Santini*, 342 F.3d at 127 ("a Catch-22 for takings plaintiffs"); Buchsbaum, *supra*, at 482 ("procedural morass"); Eagle, *supra*, at 109 ("labyrinth," "havoc"); David A. Dana & Thomas W. Merrill, Property Takings 264 (2002) ("trap"); Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. West. L. Rev. 1, 51 (1992) ("Kafkaesque maze").

in Yamagiwa's case, the property owner sued a city in state court, alleging both federal and state causes of action. The City of Chicago promptly removed the case to U.S. District Court.

This Court held that removal was proper. In spite of the facts that (1) 28 U.S.C. § 1441(a) allows removal only when the plaintiff could have brought suit in federal court in the first instance and (2) the *Williamson County* rule precluded the plaintiff from so doing, the Court held that "a case containing claims that local administrative action violates federal law . . . is within the jurisdiction of federal district courts." (522 U.S. at 528-529.)

Thus, after *City of Chicago*, the law apparently forbade property owners from seeking Fifth Amendment relief in federal court while allowing their municipal adversaries to invoke federal jurisdiction at their pleasure.

The lower federal courts have obviously been confused by the juxtaposition of these cases. Some, as noted in the Petition, have refused to permit removal, going so far as to dismiss removed cases on appeal after trial and judgment. Others, like the court in Yamagiwa's case, have allowed removal.

In a thoughtful examination of *Williamson County* and *City of Chicago*, the Eighth Circuit Court of Appeals believed that they disclosed an "anomalous . . . gap in Supreme Court jurisprudence," but declined to resolve the evident conflict because finding a resolution "is for the Supreme Court to say, not us." (*Kottschade*, 319 F.3d at 1041.)

Then came *San Remo Hotel v. City & County of San Francisco*, 545 U.S. 323 (2005). Although *San Remo* presented ripeness issues, the property owner did not challenge the soundness of *Williamson County* in this Court. Thus, as the underlying merits had been decided in the California courts, the issue became one of res judicata and the Full Faith and Credit Act. The Court applied both in concluding that the state court decision was binding.

Two things stand out in *San Remo*. First, as *Williamson County*'s validity had not been drawn in issue, the Court's opinion simply assumed its continuing validity without any discussion. Second, as discussed in the Petition, four Justices signed a separate concurring opinion authored by the late Chief Justice calling the validity of the state court litigation requirement of *Williamson County* into serious question. They called for its review by the Court when the opportunity arose.

In the certiorari context, the point is that ripeness jurisprudence is not only confused, the confusion is apparent in decisions of this Court which, as the Eighth Circuit pointed out, is the only Court that can resolve the anomaly. It is time to do so, and this case provides an appropriate opportunity to bring some sense into this doctrine.

II. A RULE DEVELOPED WHOLLY IN THE CONTEXT OF REGULATORY TAKINGS SHOULD NOT APPLY TO PHYSICAL TAKINGS

Assuming, *arguendo*, that the Court decides to retain *Williamson County* as the rule in regulatory taking cases, it ought to grant certiorari to consider whether to apply it to physical taking cases. The question of the relationship of the law of regulatory and physical takings was thoroughly argued in *Tahoe-Sierra Preservation Council v. Tahoe Reg. Plan. Agency*, 535 U.S. 302 (2002). There, the plaintiffs in a regulatory taking case sought to have the Court apply settled doctrines developed in physical taking cases. The Court refused showing, in the process, that importing the peculiar regulatory ripeness rules into physical taking cases like this one and Yamagiwa would be improper:

> "This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa. For the same reason that we do not ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use, we do not apply our precedent from the physical takings context to regulatory takings claims. . . . [P]hysical

> appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights." (*Tahoe-Sierra*, 535 U.S. at 323.)

For all the reasons the Court maintained the distinction between regulatory and physical takings in *Tahoe-Sierra*, it ought to do so here and refuse to extend *Williamson County* to physical taking cases (assuming that it chooses to retain the *Williamson County* state litigation rule at all).

CONCLUSION

The Petition for Certiorari should be granted.

MICHAEL M. BERGER
Counsel of Record
GIDEON KANNER
MANATT, PHELPS & PHILLIPS
11355 West Olympic Blvd.
Los Angeles, CA 90064-1631
(310) 312-4000
Counsel for Amicus Curiae
Joyce Yamagiwa, Trustee